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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DEREK ROCCO BARNABEI,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether an indigent criminal defendant may be denied the appointment of an expert where the prosecution relies upon expert testimony to establish an essential element of its case.

2. Whether a criminal defendant in a capital sentencing proceeding may be prevented from informing the jury that he will be ineligible for parole for at least twenty-five years.

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McMichen v. State, 458 S.E.2d 833 (Ga. 1995), *cert. denied*, 116 S.Ct. 819 (1996) 13
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State v. Price, 448 S.E.2d 827 (N.C. 1994), *cert. denied*, 115 S.Ct. 1368 (1995) 20
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Va. Code Ann. § 19.2-264.4 . . . . . 2, 3
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Anthony Champagne, Daniel Shuman & Elizabeth Whitaker, *Expert Witnesses in the Courts: An Empirical Examination*, 76 Judicature 5 (992) 15
1 Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evidence* § 1-6 (2d ed. 1993) 15

TABLE OF AUTHORITIES (continued)

W. Glaberson, *Defense in Rape Trial Suggests Accuser Had Used Cocaine*, The New York Times, Oct. 30, 1996, at B4 18
W. Glaberson, *Judge Declares A Mistrial In Rape Case*, The New York Times, Nov. 12, 1996, at B1 18
Davis A. Harris, *Criminal Law The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. Crim. L. 469 (1992) 9
Donna H. Lee, *In The Wake of* Ake v. Oklahoma: *An Indigent Criminal Defendants Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. Rev. 154 (1992) 9
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William W. Schwartzer, *Ethics And The Expert Witness*, 2 Shepard's Expert & Scientific Evidence 587 (1995) 17
Ruby B. Weeks, Annotation, *Right of Indigent Defendant in Criminal Case to Aid of State by Appointment of Investigator or Expert*, 34 A.L.R.3d 1256 (1970) 16
29 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedures* § 6262 (1997) 15
Michael J. Yaworski, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Expert on Social Attitudes*, 74 A.L.R.4th 330 (1989) . . . 16

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Michael J. Yaworski, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Investigators*, 81 A.L.R.4th 259 (1990) 16

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PETITION FOR A WRIT OF CERTIORARI

Derek Rocco Barnabei ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINION BELOW

The opinion of the Virginia Supreme Court (App., *infra*, 1a) is reported at 477 S.E.2d 270.

JURISDICTION

The judgment of the Virginia Supreme Court was entered on September 13, 1996. A petition for rehearing (App., *infra*, 41a) was denied on November 1, 1996. On January 21, 1997, the Chief Justice entered an order extending the time in which to file a petition for a writ of certiorari to and including March 1, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the Eighth Amendment and portions of Virginia's capital sentencing statute, *see* Va Code Ann. §§ 18.2-31, 19.2-264.2 to 19.2-264.5, 53.1-151, all of which are reprinted in the appendix, *infra*, at 42a-47a.

STATEMENT

On September 22, 1993, the body of Sarah Wisnosky, a first year student at Old Dominion University, was discovered in a river near Norfolk, Virginia. Petitioner Derek Barnabei, who had been dating Ms. Wisnosky for several weeks prior to her death, was charged with her murder. Although it was undisputed that petitioner and Ms. Wisnosky had engaged in consensual intercourse while dating, petitioner was also charged with rape. After a jury trial, petitioner was found guilty of rape as well as murder. Based upon the rape conviction, petitioner was then sentenced to death. App., *infra*, 1a. On appeal, the Virginia Supreme Court affirmed despite the trial court's refusal to appoint a defense expert under this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), to assist in responding to the expert testimony that the prosecution presented to support the rape charge. App., *infra*, 10a.

A. Virginia's Capital Sentencing Scheme

Under Virginia law, a defendant is subject to the death penalty if, and only if, two conditions are satisfied. First, the defendant must have committed a capital murder, which under Virginia law is defined as a murder committed willfully in the course of the commission of certain specified "predicate offenses." Va. Code

Ann. §§ 18.2-31, 19.2-264.2, App., *infra*, 42a-43a. Rape is one such predicate offense. Va. Code Ann. § 18.2-31, App., *infra*, 42a. Second, the jury must find one of two aggravating circumstance: namely, vileness or future dangerousness. Va. Code Ann. § 19.2-264.2(1), App., *infra*, 42a.

Where a jury finds a defendant eligible for the death penalty, it must then recommend a sentence of either death or life imprisonment. Va. Code Ann. § 19.2-264.2, App., *infra*, 42a. In making this recommendation, the jury may consider "any matter which the court deems relevant," including the circumstances surrounding the offense, the defendant's background, and "any other facts in mitigation of the offense." Va. Code Ann. § 19.2-264.4(B), App., *infra*, 43a-44a. If the jury does not recommend death, the trial judge must sentence the defendant to life imprisonment. Va. Code Ann. §§ 19.2-264.4(A) & (E), App., *infra*, 43a-45a. If, however, the jury recommends death, the trial judge must adopt that sentence absent "good cause." Va. Code Ann. § 19.2-264.5, App., *infra*, 45a.

B. Petitioner's Request for Expert Assistance

The only predicate offense charged in this case was rape. Prior to trial, petitioner recognized that to convict him of this offense (and subject him to the death penalty) the prosecution would need to rely almost entirely on the testimony of the medical examiner who performed the victim's autopsy: since the prosecution could not dispute that the victim had engaged in consensual relations with petitioner on several occasions prior to her murder, petitioner knew that the prosecution could only establish nonconsensual relations on the night of the murder through the expert testimony of the medical examiner.

Accordingly, petitioner made a pretrial request to secure his own expert in forensic pathology. Because of his indigent status, petitioner asked that an expert be appointed pursuant to this Court's decision in *Ake v Oklahoma*, 471 U.S. 68. Petitioner pointed out that such an expert was needed to analyze the autopsy photographs and the medical examiner's report, evaluate the examiner's testimony at trial, and, if appropriate, offer contrary

testimony. 1 Tr. 375-76. In response, the Commonwealth did not dispute petitioner's need for expert assistance; it argued only that it would be difficult for another expert to review the medical examiner's findings. 1 Tr. 377-78. Expressing surprise that petitioner would dispute the findings of "the man who performed the autopsy," the trial judge denied petitioner's motion without further comment or explanation. 1 Tr. 376, 379.

As expected, the Commonwealth's own evidence at trial revealed that the victim had engaged in consensual sexual relations, including anal intercourse, with petitioner in the weeks prior to her murder. App., *infra*, 4a.[1] As also expected, the Commonwealth based its rape charge entirely on testimony of the medical examiner. The medical examiner, relying on autopsy photographs, testified that there was evidence on the victim's body of vaginal bruising and an anal tear. App., *infra*, 8a, 5 Tr. 1720-24, 1726-29, 1826-33. To the medical examiner, this evidence suggested the use of force. App., *infra*, 8a. Moreover, in the medical examiner's view, these conditions were not normal and would be very unlikely to occur during what the medical examiner characterized as normal sexual intercourse. 5 Tr. 1804-5, 1831-2.

Although petitioner's counsel attempted to cross-examine the medical examiner, defense counsel did not have the assistance of an expert in evaluating the examiner's report and formulating questions and lines of inquiry. Moreover, petitioner had no expert testimony of his own to controvert the prosecution's expert

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[1] *See also* 3 Tr. 1308, 1328-38 (testimony of victim's roommate that the victim stayed with petitioner overnight on several occasions); 6 Tr. 2215, 2232-33 (fraternity chaplain's testimony that the victim repeatedly claimed to have had sex with petitioner); 7 Tr. 2504-5 (student's testimony that he saw the victim on petitioner's waterbed asleep and that she stayed overnight with petitioner); 7 Tr. 2553-4 (student's testimony that Sarah nodded affirmatively when asked by petitioner if she "liked it in the backdoor").

or explain the autopsy photographs, which the prosecution entered into evidence. 4 Tr. 1697.

In closing argument, the prosecutor relied heavily upon the medical examiner's testimony in urging the jury to find that petitioner had raped Ms. Wisnosky. 9 Tr. 3295-97. Specifically, the prosecutor told the jury that, based on the medical examiner's testimony, "we know that the sex that defendant had wasn't voluntary consensual sex." 9 Tr. 3296-97. After hearing the medical examiner's testimony and the prosecutor's summation, the jury returned guilty verdicts on both the rape charge and the murder charge. App., *infra*, 1a.

C. The Sentence

Prior to jury deliberations, petitioner requested that the jury be instructed that he would ineligible for parole for at least twenty-five years. App., *infra*, 16a. Without denying the relevance of this fact to the jury's deliberation, the trial court refused to give such an instruction. 9 Tr. 3487-88. After deliberating for a period of time, the jury sent the trial court a note asking, "does life in prison mean life, or is a person eligible for parole." 10 Tr. 3693. Once again, however, the trial court refused to instruct the jury on petitioner's parole eligibility. *Id.* The jury then returned with a recommendation of death, which the trial court adopted. 10 Tr. 3695-96.

D. The Appeal

On direct appeal to the Virginia Supreme Court,[2] petitioner argued, *inter alia*, that the medical examiner's expert testimony was essential to the Commonwealth's case on the rape charge and that the trial court therefore should have appointed an expert to assist him in responding to that testimony. App., *infra*, 9a.

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[2] The Virginia Supreme Court certified petitioner's appeal of his rape conviction (App., *infra*, at 40a) and consolidated that appeal with petitioner's sentencing appeal, which is automatically reviewable by that court under Virginia law. Va. Code Ann. §§ 17-110, 17-116.06.

Petitioner also argued that the trial court's refusal to instruct the jury on his parole eligibility unfairly prevented him from presenting mitigating evidence to the jury and rebutting the Commonwealth's claims of future dangerousness. App., *infra*, 16a. The court rejected both arguments and affirmed both the conviction and death sentence. App., *infra*, at 20a.

1. In considering petitioner's claim that he was improperly denied expert assistance, the Virginia Supreme Court recognized that, under *Ake v. Oklahoma*, 470 U.S. 68, indigent criminal defendants are entitled to expert assistance where such assistance is likely to be a "significant factor" at trial. App., *infra*, 9a (quotation omitted). The court went on, however, to assert that indigent defendants have the burden of showing a "particularized need" for expert assistance and that a mere "hope or suspicion that favorable testimony may be procured from an expert" does not satisfy that burden. App., *infra*, 9a-10a. As confirmed by another decision handed down the same day as the present case, *see Husske v. Commonwealth*, App., *infra*, 21a, 476 S.E.2d 920 (Va. 1996), *cert. denied*, 1997 WL 27396 (U.S. Feb. 24, 1997) (No. 96-7469), the Virginia Supreme Court's view is that the appointment of an expert is constitutionally required only where an indigent criminal defendant is able, prior to obtaining expert assistance, to detail the testimony that the desired expert would give.[3] Accordingly, even though the Commonwealth did not

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[3] The defendant in *Husske*, like petitioner here, was charged with rape, and the Commonwealth presented expert testimony concerning DNA in support of that charge. *See Husske*, App., *infra*, 25a, 476 S.E.2d at 923. Although defense counsel in *Husske* demonstrated that a lay person could not effectively evaluate expert testimony in an area as complex as DNA testing and that there was a "significant and honestly held disagreement over the validity" of DNA testing within the scientific community, App., *infra*, 39a, 476 S.E.2d at 930 (Poff, J., dissenting) (quotation omitted), a majority of the Virginia Supreme Court found the defendant's request for expert assistance too "generalized." App., *infra*, 31a, 476 S.E.2d at 926. The Virginia Supreme Court also noted that Husske was not prejudiced by the trial court's failure to appoint an

dispute before the trial court that a forensic expert would have assisted petitioner in reviewing the medical examiner's findings and cross-examining him at trial, or even that a forensic expert appointed for the defense might have reached conclusions contrary to the medical examiner, the Virginia Supreme Court held that petitioner had no right to expert assistance. App., *infra*, 10a.

2. The court below also rejected petitioner's sentencing challenge. Relying upon several prior decisions, the court summarily distinguished this Court's decision in *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994) — which held that defendants must be permitted to rebut claims of future dangerousness with evidence of permanent ineligibility for parole — as applicable only "to capital defendants who are ineligible for parole" permanently. App., *infra*, 16a. The court below did not address petitioner's alternative argument that the Eighth Amendment entitled him to present evidence of mitigating factors, such as a substantial period of ineligibility for parole, to the sentencing jury.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE WIDESPREAD CONFLICT OVER WHEN INDIGENT CRIMINAL DEFENDANTS ARE ENTITLED TO EXPERT ASSISTANCE.

This case raises an issue of critical importance left open in *Ake v. Oklahoma*, 470 U.S. 68 (1985): namely, the circumstances under which an indigent criminal defendant is entitled to the appointment of a nonpsychiatric expert to assist in his or her defense. Moreover, the issue arises in the most compelling possible circumstances — where a defendant's death sentence turned entirely on expert testimony presented by the prosecution. Although petitioner could not have been sentenced to death without a conviction on the rape charge that was procured through

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expert because the defendant "confessed to the crimes." App., *infra*, 31a, 476 S.E.2d at 926.

the testimony of the prosecution's expert in forensic pathology, petitioner's request for the appointment of his own expert on that subject was denied.

In *Ake*, this Court recognized that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." 470 U.S. at 77. This Court went on to hold specifically that the assistance of an expert psychologist is integral to an effective defense — and therefore constitutionally required — where the sanity of a criminal defendant is a "significant factor at trial." *Id.* at 83. This Court did not, however, attempt to define the contours of the right of indigent criminal defendants to the appointment of the state-funded experts. To the contrary, this Court expressly refused to do so in *Ake*, *see id.* at 86 n.12, and in subsequent cases has failed to revisit the issue. *See, e.g.*, *Johnson v. Oklahoma*, 484 U.S. 878 (1987) (Marshall and Brennan, JJ., dissenting from denial of certiorari); *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985).

The result has been widespread conflict and confusion among the state and lower federal courts over the proper standard for appointing expert witnesses for indigent criminal defendants. Review by this Court is necessary to resolve this important and growing conflict.

A. The State and Lower Federal Courts Are Hopelessly Divided Over When Indigent Criminal Defendants Have A Constitutional Right To Expert Assistance.

There can be no serious dispute that the lower courts are sharply divided over when an indigent criminal defendant is entitled to appointment of an expert. As the Fifth Circuit has noted, courts have developed "varying standards for determining what constitutes a showing sufficient to reach the *Ake* threshold." *Williams v. Collins*, 989 F.2d 841, 846 n.12 (5th Cir. 1993). Numerous commentators have likewise noted the growing and widespread conflict. *See, e.g.*, Karla C. McGrath, Sommers v. Commonwealth: *An Indigent Criminal Defendant's Right to*

Publicly Funded Expert Assistance Other than the Assistance of Counsel, 84 Ky. L.J. 387, 394 (1996) ("The *Ake* decision has begotten widely diverse interpretations of the type and degree of assistance [*Ake*] requires courts to grant to an indigent criminal defendant.") (footnote omitted); Donna H. Lee, *In the Wake of* Ake v. Oklahoma*: An Indigent Criminal Defendant's Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. Rev. 154, 168-9 (1992) ("[S]ince 1985, state courts have construed the *Ake* decision with widely varying results.").[4]

1. Several courts have concluded that an indigent criminal defendant is entitled to expert assistance whenever expert testimony plays a significant or essential part in the prosecution's case.

The Mississippi Supreme Court reached this conclusion in a case remarkably similar to this one. In *Harrison v. State*, 635 So.2d 894 (Miss. 1994), the defendant, like petitioner, was sentence to death based upon charges of rape and murder. *See id.* at 895. As here, the testimony of the prosecution's expert pathologist was essential to the rape conviction. *See id.* at 896, 902 (noting pathologist's opinion that "the victim's injuries could only have been caused by a human penis"). Unlike the Virginia Supreme Court, however, the Mississippi Supreme Court held that the trial court's refusal to provide the defense with its own pathologist rendered the trial fundamentally unfair. *See id.* at

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[4] *Accord, e.g.*, Fred Warren Bennett, *Toward Eliminating Bargain Basement Justice: Providing Indigent Defendants with Expert Services and an Adequate Defense*, 58 Law & Contemp. Probs. 95, 109-10 (1995) (noting that courts have "struggled to refine *Ake's* threshold requirement with widely varied results"); Karrin Maureen McCormick, *The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of Ake*, 30 Am. Crim. L. Rev. 1329, 1351 (1993) (remarking that *Ake* is "subject to contradictory interpretations"); Davis A. Harris, *Criminal Law, The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. Crim. L. 469, 487-88 (1992) (observing "little in the way of a discernible pattern" in the application of *Ake*).

901-02. The court based its decision solely on the fact that "the State's expert offer[ed] the only evidence on the crucial element of rape . . . ." *Id.* at 902.

Similarly, in *State v. Bridges*, 385 S.E.2d 337 (N.C. 1989), the North Carolina Supreme Court found that the trial court unconstitutionally denied an indigent defendant the assistance of a fingerprint expert. The court observed that the testimony of the prosecution's fingerprint experts was critical to the state's case because that testimony provided the "only direct evidence linking the defendant to the offense." 385 S.E.2d at 339. As a consequence, the court concluded, "[w]ithout his own expert to examine the items found at the crime scene and to compare any latent prints to his own impressions," the defendant was unable to assess, and attack, the testimony of the prosecution's experts, which in turn "devastated" the defendant's "chances of persuading the jury to reject the [prosecution] expert's conclusions." *Id.* (quotation omitted).[5]

In a pre-*Ake* decision upon which courts continue to rely,[6] the Fourth Circuit adopted the same position. In *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980), an indigent defendant was charged with murdering a person he had wounded eight months prior to her death. *Id.* at 1023. Although the prosecution relied on the testimony of the county medical examiner to establish that

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[5] In an earlier decision, the North Carolina Supreme Court rejected the suggestion that indigent defendants must identify a basis for questioning the accuracy of the testimony of the prosecution's experts. *See State v. Moore*, 364 S.E.2d 648, 657 (N.C. 1988) (observing that such a requirement would "demand that the defendant possess already the expertise of the witness sought").

[6] *See, e.g., Terry v. Rees*, 985 F.2d 283, 283 (6th Cir. 1993) (per curiam); *United States v. Bourne*, No. 90-5522, 1991 WL 209832, at *1 (4th Cir. Oct. 21, 1992); *Willamson v. Reynolds*, 904 F.Supp. 1529, 1559 (E.D. Okla. 1995); *Tuggle v. Thompson*, 854 F.Supp. 1229, 1245 (W.D. Va. 1994), *rev'd on other grounds*, 57 F.3d 1356 (4th Cir.), *vacated on other grounds*, 116 S.Ct. 283 (1995).

the victim's death was caused by the eight-month-old wound, the trial court refused the defense's request for an expert to assist in challenging the examiner's testimony. *See id.* at 1023, 1026. On habeas review, the Fourth Circuit held that denial of this request violated due process. *See id.* at 1026-27. Defense counsel's lack of expert assistance, the court explained, unfairly hampered his ability to cross-examine the medical examiner and may also have prevented defendant from offering opposing expert testimony. *See id.* In reaching this conclusion, the Fourth Circuit expressly rejected the view — articulated by the court below — that an indigent criminal defendant must demonstrate that the expert whose assistance he seeks would provide helpful testimony at trial:

> It is not incumbent upon Williams to prove . . . that an independent expert would have provided helpful testimony at trial. An indigent prisoner who needs expert assistance because the subject matter is beyond the comprehension of laymen should not be required to present proof of what an expert would say when he is denied access to an expert.

Id. at 1026-27.

In *Terry v. Rees*, 985 F.2d 283 (6th Cir. 1993) (per curiam), the Sixth Circuit specifically endorsed the Fourth Circuit's approach. In *Terry*, the defendant sought the assistance of a pathologist to respond to testimony of the prosecution's expert on the cause of the victim's death. *See* 985 F.2d at 283. Relying upon *Ake* and *Williams*, the district court held that the state court's denial of expert assistance deprived the defendant of the opportunity to present an effective defense and therefore violated due process. *See id.* Likewise endorsing the reasoning in *Williams*, the Sixth Circuit agreed. *See id.* at 285; *but see id.* at 285 (finding the denial of expert assistance to be harmless error).

The Eighth Circuit relied upon similar reasoning in *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987) (Arnold, J.), *cert. denied*, 487 U.S. 1210 (1988). The defendant in that case was convicted of rape based upon the hypnotically-enhanced testimony of the victim. *Id.* at 1241-42. In addition to noting the "perils

of hypnotically enhanced testimony" and the role that an expert could have played in attacking such testimony, *id.* at 1244, the Eight Circuit observed that the State had presented expert testimony concerning hypnotically-enhanced testimony. *See id.* at 1245. In the court's view, because the state relied upon the testimony of its own expert on hypnosis, under *Ake* "[i]t should not have denied [the defendant] a similar weapon." *Id.* at 1244, 1245.

2. Other courts have taken the position that an indigent criminal defendant must show that the prosecution's expert testimony is subject to serious dispute *before* an opposing expert must be appointed under *Ake*.

For example, in *Johnson v. State*, 731 P.2d 993 (Okla. Crim. App. 1987), *overruled on other grounds by Green v. State*, 862 P.2d 1271 (Okla. Crim. App. 1993),[7] the defendant was charged with murdering an elderly woman. Beyond some stolen goods found in the defendant's apartment, the only evidence connecting the defendant to the murder were samples of hair and bodily fluids discovered in the victim's apartment. 731 P.2d at 997, 1007. Although the prosecution presented the testimony of a forensic chemist linking the samples to the defendant, the Oklahoma Court of Criminal Appeals found no error in the trial court's denial of the defendant's request for the "assistance of a forensic chemist to counter the State's use of such witnesses." *Id.* at 1006-07. Notwithstanding the obvious importance of the forensic chemist's testimony to the prosecution's case, the court held that indigent criminal defendants are not entitled to expert assistance unless they demonstrate that either the expert was biased or the expert's "tests or results were seriously in question." *Id.* at 1007; *see also Rojem v. State*, 753 P.2d 359, 364 (Okla. Crim. App.) (holding that "scientific evidence is ordinarily not vulnerable to inaccurate resolution and in itself does

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[7] The Oklahoma Court of Criminal Appeals has "exclusive appellate jurisdiction" over criminal matters in that state. Okla. Stat. tit. 20 § 40.

not ordinarily call for a defense expert") (citation omitted), *cert. denied*, 488 U.S. 900 (1988).

In *Hough v. State*, 560 N.E.2d 511 (Ind. 1990), the Indiana Supreme Court also upheld a refusal to appoint an expert to assist the defense despite the prosecution's reliance upon expert testimony. In *Hough*, the prosecution presented the testimony of a ballistics expert corroborating questionable testimony by a co-assailant that defendant murdered the victim. The expert testified that shell casings found in the defendant's apartment matched casings found at the crime scene. *See id.* at 517. In spite of the obvious significance of this testimony to the prosecution's case, the Indiana Supreme Court found no error in the trial court's refusal to appoint a ballistics expert to assist the defense. In that court's view, the Constitution did not require appointment of an expert because the defendant had offered "no grounds from which to reason or suppose that any other expert would find cause to question the State's witnesses, observations, or conclusions." *Id.*

The Fifth Circuit, the Supreme Court of Alabama, and the Texas Court of Criminal Appeals have similarly held that the appointment of an expert under *Ake* turns upon whether the expert testimony presented by the prosecution is subject to varying expert opinion. *See, e.g.*, *Yohey v. Collins*, 985 F.2d 222, 2227 (5th Cir. 1993) (upholding refusal to appoint experts because, among other things, the defendant failed to show that the testimony presented by the prosecution's expert was "subject to disagreement between experts"); *Dubose v. State*, 662 So.2d 1189, 1194 (Ala. 1995) (finding unconstitutional refusal to appoint expert where defendant showed that the evidence analyzed by the prosecution's expert was "subject to varying expert opinions"); *McMichen v. State*, 458 S.E.2d 833, 841 (Ga. 1995) (upholding refusal to appoint expert where defendant failed to show that subject addressed by prosecution's expert was "subject to varying expert opinion") (footnote omitted), *cert. denied*, 116 S.Ct. 819 (1996); *Rey v. State*, 897 S.W.2d 333, 341 (Tex. Crim. App. 1995) (en banc) (noting that requests for expert assistance

have been denied where there was no "showing that there was a reason to question the State's expert and proof").[8]

3. The Virginia Supreme Court appears to have adopted an even more restrictive standard. In direct conflict with the decisions discussed on pages 12-13, *supra*, the court below held that indigent criminal defendants must show more than that "the only evidence of rape adduced at trial was the medical examiner's testimony." App., *infra*, 9a. According to the decision below, indigent defendants must also make a "showing of particularized need" in order to establish their entitlement to expert assistance in responding to expert testimony presented by the Commonwealth. App., *infra*, 9a. Moreover, as the court below made clear in the *Husske* case handed down the same day, an indigent criminal defendant cannot show a particularized need by merely demonstrating a "significant and honestly held disagreement over the validity" of the techniques underlying the testimony of a prosecution expert. 476 S.E.2d at 930 (Poff, J., concurring in part and dissenting in part) (quotations omitted). Apparently, in the Virginia Supreme Court's view, any request for expert assistance must be accompanied by proof that favorable evidence will be obtained from the expert the petitioner seeks to appoint. App., *infra*, 10a.

4. In sum, review by this Court is essential to resolve the sharp and widening split among the lower courts regarding when an indigent criminal defendant is entitled to the assistance of an expert.

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[8] The Texas Court of Criminal Appeals has "final appellate jurisdiction" over criminal matters in that State. Tex. Const. art. 5, § 5; *see State ex. rel. Wilson v. Briggs*, 351 S.W.2d 892, 894 (Tex. Crim. App. 1961).

B. Issues Regarding The Appointment Of Expert Witnesses For Indigent Criminal Defendants Are Of Great Significance To The Administration of Justice.

A decade ago, two justices of this Court found a "pressing need to consider and resolve" "whether and when an indigent defendant is entitled to nonpsychiatric expert assistance." *Johnson v. Oklahoma*, 484 U.S. at 880-81 (Marshall and Brennan, JJ., dissenting from denial of certiorari). As these justices recognized, the importance of expert assistance to indigent criminal defendants is clear, especially where that assistance is needed to respond to expert testimony presented by the prosecution. "Expert testimony," this Court has observed, "can be both powerful and quite misleading." *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 113 S. Ct. 2786, 2798 (1993) (quotation omitted). Jurors often display an "unquestioning deference to expert opinion [that can] seriously jeopardize accurate factfinding." 29 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure* § 6262, at 183 & n.20 (1997).[9] Moreover, when an indigent criminal defendant is denied expert assistance in responding to testimony presented by a prosecution expert, the defendant is rendered effectively defenseless. As this

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[9] *Accord, e.g., United States v. Boney*, 977 F.2d 624, 631 (D.C. Cir. 1992)(noting the "inherent danger with expert testimony unduly biasing the jury because of its aura of special reliability and trust")(quotation omitted); *United States v. Young*, 745 F.2d 733, 765-66 (2d Cir. 1985)(Newman, J., concurring)(noting that the "aura of special reliability and trustworthiness surrounding expert testimony" cautions against its use, "especially when offered by the prosecution in criminal cases")(quotation and citation omitted), *cert. denied*, 470 U.S. 1084 (1985); *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974)(noting that "scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury of laymen"); *see generally* 1 Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evidence* § 1-6(B)(2d ed. 1993); Anthony Champagne, Daniel Shuman & Elizabeth Whitaker, *Expert Witnesses in the Courts: An Empirical Examination*, 76 Judicature 5, 8 (1992).

Court has observed, the primary tools for attacking expert testimony are "[v]igorous cross-examination" and "presentation of contrary evidence," *Daubert*, 113 S. Ct. at 2798. Without expert assistance, a defendant is essentially deprived of these tools. It is for this reason that Justice Cardozo observed nearly seventy years ago that a criminal defendant is "at an unfair disadvantage, if he is unable because of poverty to parry by his own [expert] witnesses the thrusts of those against him." *Reilly v. Barry*, 166 N.E. 165, 167 (N.Y. 1929).

Nor can there be any doubt about the frequency with which the issue of expert assistance for indigent criminal defendants recurs. With the increasing use of DNA evidence and other new scientific techniques, it recurs in thousands of cases each year involving indigent criminal defendants.[10] As a consequence, the need for guidance by this Court is greater than ever. Moreover, this case presents an excellent vehicle in which to consider this issue: the issue is clearly presented, and the denial of expert assistance was critical to the imposition of the death penalty. Thus, review by this Court should be granted.

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[10] Decisions considering this issue are collected in a series of annotations published by *American Law Reports*. *See* Michael J. Yaworski, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Psychiatric or Psychological Expert*, 85 A.L.R.4th 19 (1991); Yaworski, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Investigators*, 81 A.L.R.4th 259 (1990); Yaworksi, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Chemist, Toxicologist, Technician, Narcotics Expert, or Similar NonMedical Specialist in Substance Analysis*, 74 A.L.R.4th 388 (1989); Yaworski, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Expert on Social Attitudes*, 74 A.L.R.4th 330 (1989); Yaworksi, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Ballistics Expert*, 71 A.L.R. 4th 638 (1989); Ruby B. Weeks, Annotation, *Right of Indigent Defendant in Criminal Case to Aid of State by Appointment of Investigator or Expert*, 34 A.L.R.3d 1256 (1970).

C. The Decision Below Was Wrongly Decided.

This Court has "long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Ake*, 470 U.S. at 76. As a consequence, indigent defendants must be provided with all the "basic tools of an adequate defense." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). The decision below ignores this fundamental principle.

As this Court recognized in *Ake*, criminal defendants have an "almost uniquely compelling" interest in reducing the risk of error in criminal proceedings. 470 U.S. at 78. States likewise have an interest in the "fair and accurate adjudication of criminal cases." *Id.* at 78. As a consequence, a state's only legitimate interest in denying indigent criminal defendants access to expert assistance is economic, an interest that is "not substantial" in light of the compelling interest of both the State and the defendant in accurate dispositions. *Id.* at 79. Accordingly, this Court concluded in *Ake* that access to expert assistance is constitutionally required whenever it would significantly enhance the accuracy of trial. *See id.* at 79-83. Given the inherent dangers of expert testimony in criminal cases, *see supra* p.15 & n.9, that is the case whenever the prosecution relies on expert testimony to prove a significant element of its case.

Nor can there be any doubt that the appointment of an expert in this case would have reduced the risk of error here. The only evidence that petitioner engaged in nonconsensual intercourse with the victim on the night of the murder was the medical examiner's opinions drawn from his analysis of the victim's wounds. Yet, that opinion was clearly not the last word on the subject. Forensic pathology is not an exact science: it is "a sub-specialty of medicine," a field that "eludes mathematical precision, as evidenced by the need for a 'second opinion' with regard to any important medical question." *Rey v. State*, 897 S.W.2d at 338; *see also* William W. Schwartzer, *Ethics And The Expert Witness*, 2 Shepard's Expert & Scientific Evidence 587, 588 (1995) ("We

can agree that forensic science is not an exact science — there are more areas that are gray than black and white."). Thus, based upon the autopsy photographs and other forensic evidence in the record, a second pathologist may have disagreed with the medical examiner and explained to the jury that Ms. Wisnosky's wounds may well have been the result of consensual relations.[11] Under such circumstances, appointment of an expert to assist the defense plainly would have significantly reduced the risk of error.

The court below nonetheless refused to appoint an expert because petitioner failed to demonstrate that such an expert would provide testimony favorable to the defense. App., *infra*, 10a. But as then-Justice Rehnquist pointed out in dissent, the defendant in *Ake* likewise failed to make such a showing. *See Ake*, 470 U.S. at 90-91 (Rehnquist, J., dissenting) (noting the lack of any evidence of the defendant's insanity at the time of the offenses in question). More fundamentally, nothing in *Ake* suggests that an expert's only constitutionally significant function is to testify at trial. To the contrary, *Ake* expressly noted that experts assist in the "process of investigation" and "interpretation" in addition to providing testimony. *Ake*, 470 U.S. at 80; *see also id.* (noting that experts "know the probative questions to ask of the opposing party's [experts] and how to interpret their answers").

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[11] For example, in a rape case from Connecticut that has recently attracted a great deal of media attention, a wealthy defendant was able to retain Dr. Michael Baden, the former chief medical examiner of New York City, to assist in his defense. *See* W. Glaberson, *Defense in Rape Trial Suggests Accuser Had Used Cocaine*, The New York Times, Oct. 30, 1996, at B4. While the prosecution presented expert medical testimony that the alleged victim's injuries were due to nonconsensual intercourse, Dr. Baden testified that the injuries were consistent with consensual sex. *See id.* Indeed, according to Dr. Baden, there was "no way by looking at the person with those injuries to tell whether it was consensual or nonconsensual." *Id.* That trial, unlike this one, ended in a hung jury and a mistrial. *See* W. Glaberson, *Judge Declares A Mistrial In Rape Case*, The New York Times, Nov. 12, 1996, at B1.

Furthermore, it would be fundamentally unfair to require indigent criminal defendants to describe the testimony that they expected to elicit from their experts *prior* to retaining those experts. As the Fourth Circuit has recognized, it is only *after* consulting with an expert that a defendant can determine what the expert will say. *Williams*, 618 F.2d at 1026-27. Yet, under the standard imposed below, a defendant who cannot make a proffer of expert testimony has not made a sufficient showing for the appointment of an expert.

Finally, the rigid standard employed by the court below is especially inappropriate where, as here, a defendant faces the death penalty. As this Court has noted on numerous occasions, there are "significant constitutional differences between the death penalty and lesser punishments" which demand special procedural protections. *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *see also Herrera v. Collins*, 506 U.S. 390, 399 (1993) (requiring "additional protections [in capital cases] because of the nature of the penalty at stake."). Thus, if there is any situation in which expert assistance should be liberally provided, it is where, as here, the application of the death penalty turns upon the testimony of a government expert. *See Ake*, 470 U.S. at 87 (Burger, C.J., concurring) (emphasizing that case involved capital defendant); *id.* (Rehnquist, J., dissenting) (urging that rule in *Ake* be limited to capital cases).

II. THIS CASE PRESENTS IMPORTANT ISSUES LEFT OPEN TWO TERMS AGO IN *SIMMONS v. SOUTH CAROLINA*.

In *Simmons v. South Carolina*, this Court held that, where a State asks for the death penalty based upon a defendant's supposed future dangerousness to society, due process requires that the jury be informed that the defendant would never be eligible for parole under a sentence of life imprisonment. But because *Simmons* generated five separate opinions — a plurality, three concurrences, and a dissent — the decision leaves open the important issue whether juries must also be informed of lengthy, but not permanent, periods of parole ineligibility. In addition, a

majority of the Court failed to consider whether the Eighth Amendment independently requires that juries be informed of how long a defendant sentenced to life would be ineligible for parole. *See*, 114 S. Ct. at 2193 n.4 (plurality opinion); *id.* at 2199 (Ginsburg, J., concurring); *id.* at 2200 (O'Connor, J., concurring). Both issues are squarely presented in this petition.

1. A conflict has developed among the lower courts over how *Simmons* applies to lengthy, but less than permanent, periods of parole ineligibility. One state supreme court has found that no constitutionally-significant distinction can be drawn between permanent and lengthy periods of parole ineligibility and therefore has held that defendants must be allowed to rebut claims of future dangerousness with evidence of "the length of incarceration facing the defendant if he is not sentenced to death." *Clark v. Tansy*, 882 P.2d 527, 533 (N.M. 1994) (citation omitted). Other state and local federal courts have disagreed, limiting *Simmons* to situations in which a State claims future dangerousness and "a defendant is statutorily ineligible for parole." *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 1417 (1996); *see also State v. Price*, 448 S.E.2d 827, 831 (N.C. 1994), *cert. denied*, 115 S.Ct. 1368 (1995); *Trice v. State*, 912 P.2d 349, 352 (Okla. Crim. App. 1996); *Smith v. State*, 898 S.W.2d 838 (Tex. Crime App.) (en banc), *cert. denied*, 116 S.Ct. 131 (1995).

The difficulty that courts have encountered in construing and applying *Simmons* is exemplified by the split decision in *Smith v. State*. Like the Supreme Court in *Simmons*, the Texas Court of Criminal Appeals in *Smith* produced five separate opinions. The plurality read *Simmons* narrowly as limited to situations in which the prosecutor injects "the issue of appellant's potential early release from prison based upon parole" into the case. *Smith*, 898 S.W.2d at 852 (Meyers, J.). Two of the three dissenters read *Simmons* more broadly to apply "whenever future dangerousness is in issue in a capital punishment proceeding." *Id.* at 867 (Clinton, J., dissenting). And the two concurrences, failing to find any guidance in the five separate opinions in *Simmons*, simply treated the "precedential value of *Simmons* [a]s limited"

and read the opinion in the "most narrow light." *Id.* at 857 (Mansfield, J., concurring) *id.* at 856 (Baird, J., concurring).

Plainly, the lower courts are in need of guidance on how to apply *Simmons* to individuals who are ineligible for parole for substantial, but not permanent, periods of time.

2. There is also a conflict among the lower courts over whether the Eighth Amendment, independent of any allegations of future dangerousness, requires that juries be informed of a defendant's ineligibility for parole. Three state courts of final resort have held that there is such a requirement. *See State v. Bey*, 610 A.2d 814, 836 (N.J. 1992) (reasoning that the "principle of reliability in capital sentencing requires that a jury be fully informed of its responsibility in determining the appropriateness of the death penalty") (citation omitted), *cert. denied*, 115 S.Ct. 1131 (1995); *State v. Henderson*, 789 P.2d 603, 606-07 (N.M. 1990) (reasoning that "states cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty") (quotation and emphasis omitted), *overruled on other grounds by Clarke v. Tansy*, 882 P.2d 527 (N.M. 1994); *Doering v. State*. 545 A.2d 1281, 1295 (Md. 1988) (same). Other federal and state courts have reached the opposite conclusion. *See Johnson v. Scott*, 68 F.3d 106, 112 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 1358 (1996); *Ingram v. Zant*, 26 F.3d 1047, 1052-53 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1137 (1995); *Burgess v. State*, 450 S.E.2d 680, 694 (Ga. 1994), *cert. denied*, 115 S. Ct. 2559 (1995); *State v. McWee*, 472 S.E.2d 235, 238 (S.C. 1996), *cert. denied*, 117 S.Ct. 695 (1997); *Elliott v. State*, 858 S.W.2d 478, 489-90 (Tex. Crim. App.) (en banc), *cert. denied*, 114 S.Ct. 563 (1993).

3. There can be no doubt that the issue of parole eligibility arises frequently. Nor can there be any doubt about the

importance of the issue.[12] As the Court recognized in *Simmons*, "most juries lack accurate information about the precise meaning of 'life imprisonment.'" *Simmons*, 114 S. Ct. at 2197 & n.9 (plurality opinion); *see also* Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605, 1624 (1989) (noting the widespread perception in Virginia that a person convicted of capital murder serves only ten years before being released on parole). Moreover, it is clear that, even where juries are instructed not to consider parole eligibility, they nonetheless frequently decide whether to impose capital punishment based upon speculation concerning the defendant's eligibility. *See Simmons*, 114 S. Ct. at 2197. As a consequence, unless this Court declares that defendants have the right to inform jurors about their actual eligibility for parole, there is a strong possibility that defendants such as petitioner will be put to death because of easily-correctable juror confusion and misunderstanding.

4. On the merits, the decision below erred. First, this Court's decision in *Simmons* cannot be limited to individuals who are permanently ineligible for parole. In *Simmons* and in earlier cases, this Court recognized the fundamental right of defendants facing capital punishment to rebut claims of future dangerousness and other aggravating circumstances. *See, e.g.*, *Simmons*, 512 U.S. at 165 (plurality opinion); *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality opinion). Accurate information concerning a defendant's minimum term of incarceration is just as relevant to rebutting claims of future dangerousness as evidence of statutory ineligibility for parole. *See, e.g.*, *Smith*, 898 S.W.2d at 869 (Clinton, J., dissenting) ("How much of his life the capital defendant will spend in prison is relevant to the future

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[12] Because defendants committing capital crimes in many other states may be eligible for parole, *see Simmons*, 114 S.Ct. at 2202 (Scalia, J., dissenting), it makes no difference that Virginia has eliminated parole for capital murders committed after January 1, 1995. *See* Va. Code Ann. § 53.1-151(B).

dangerousness determination in exactly the same way as the fact that he will spend the rest of his life there."). The sentencer may, of course, choose to give less weight to parole ineligibility when ineligibility is for a substantial, rather than permanent, period of time. That fact does not, however, in any way diminish the fundamental right of defendants facing capital punishment to rebut claims of future dangerousness.

Second, evidence of parole ineligibility must be admitted to ensure the reliability of death sentences. *See Simmons*, 114 S. Ct. at 2198 (Souter, J., concurring) (discussing the Eighth Amendment's "heightened standard for reliability in the determination that death is the appropriate punishment in a specific case") (quotation omitted). As noted above, *see supra* p. 22, juries decide whether to impose the death penalty based on how long they think a defendant will be incarcerated under a life sentence, and they harbor serious misconceptions concerning the minimum length of a life sentence. As a consequence, the only way to ensure that a person has not been sentenced to death based upon a "false choice" between a sentence of death and a sentence of limited incarceration (*id.* at 2193 (plurality opinion)) is to permit the defendant to inform the jury of the true length of the sentence he faces and, therefore, of the true choice confronting the jury.

In short, the decision below is contrary to both *Simmons* and Eighth Amendment. This Court should therefore grant certiorari to resolve the fundamental issues concerning evidence of parole eligibility raised by this petition.[13]

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[13] In the alternative, this Court may wish to hold this case pending its decision in *O'Dell v. Netherland*. *See* 65 U.S.L.W. 3452 (U.S. Dec. 19, 1996) (No. 96-6867) (granting certiorari). Although the question presented in *O'Dell* — whether *Simmons* applies retroactively to a defendant who is prevented from informing a capital sentencing jury of his parole ineligibility — differs from the one presented here, the decision in *O'Dell* may shed light on the question here. Specifically, in determining whether *Simmons* announced a new rule for purposes of

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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February 27, 1997

Teague v. Lane, 489 U.S. 288 (1989), this Court may clarify the nature of the rule announced in *Simmons*.

APPENDIX

APPENDIX A

SUPREME COURT OF VIRGINIA.

Derek Rocco BARNABEI

v.

COMMONWEALTH of Virginia.

Record Nos. 952168, 952169.

Sept. 13, 1996.

STEPHENSON, Justice.

In these appeals, we review a capital murder conviction and sentence of death imposed upon Derek Rocco Barnabei (Record No. 952168), along with his conviction of rape (Record No. 952169).

I

PROCEEDINGS

Barnabei was charged in an indictment with capital murder, *i.e.*, the willful, deliberate, and premeditated killing of Sarah J. Wisnosky in the commission of rape. Code § 18.2-31(5). Barnabei, in a separate indictment, also was charged with the rape of Wisnosky. Code § 18.2-61(A).

In a bifurcated jury trial conducted pursuant to Code §§ 19.2-264.3 and - 264.4, Barnabei was found guilty of capital murder and of rape. The jury fixed Barnabei's punishment for the rape conviction at 13 years' imprisonment, and, upon further evidence, fixed Barnabei's punishment for the capital murder conviction at death, based upon both the "vileness" and "future dangerousness" predicates. Code § 19.2-264.2. After considering a report prepared by a probation officer pursuant to Code § 19.2-264.5, the trial court sentenced Barnabei in accord with the jury verdicts.

Pursuant to Code § 17-110.1(F), we have consolidated the automatic review of Barnabei's death sentence with the appeal of

right of his capital murder conviction.[1] By order entered December 7, 1995, Barnabei's appeal of his rape conviction was certified from the Court of Appeals, Code § 17-116.06, and we have consolidated that appeal with the capital murder appeal and given them priority on our docket, Code § 17-110.2.

II

THE CRIMES

On September 22, 1993, shortly after 6:00 p.m., Wisnosky's nude body was discovered floating in the Lafayette River, in the City of Norfolk. Nearby, the police found a leather shoe, later identified as Wisnosky's, on one of the steps leading down to the river. The police also found a washcloth, which appeared to be bloodstained.

An autopsy, performed by a state deputy medical examiner, revealed that Wisnosky had sustained at least 10 severe blows to the back and right side of her head, fracturing her skull. The blows had been inflicted by a heavy, blunt object, such as a ball peen hammer.

The autopsy further revealed that Wisnosky had sustained bruising to her abdomen, which the examiner testified could have been caused by a blow to Wisnosky's abdomen or by the assailant's kneeling on her "to hold [her] in place." Wisnosky also had sustained bruises to her neck and larynx, and petechiae were found on her face which, according to the medical

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[1] Barnabei has assigned 53 errors. However, he did not discuss on brief, and thus has waived, assignments of error numbered 1, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 21, 22, 27, 29, 30, 31, 36, 37, 42, 43, 44, 45, 46, and 49. Rule 5:27; *Williams v. Commonwealth*, 248 Va. 528, 537, 450 S.E.2d 365, 372 (1994), *cert. denied*, __ U.S. __, 115 S.Ct. 2616, 132 L.Ed.2d 858 (1995). In his appeal, we do consider the 14 questions discussed in his brief.

examiner, were "a manifestation of mechanical asphyxia."[2] These findings suggested to the examiner that Wisnosky had been "manually strangled."

Additionally, the medical examiner found bruising on the introitus of Wisnosky's vagina and a half-inch tear of her anal opening. The examiner opined that the bruising had been sustained prior to Wisnosky's death and that the anal tear had been inflicted "very close to the time of her death." The examiner also opined that such a tear is usually caused by "forcible stretching."

The examiner further opined that Wisnosky's death was not caused by drowning although a "little fluid" was found in her lungs. He, however, could not rule out the possibility that Wisnosky may not have been dead when her body was put into the water. The "primary cause" of Wisnosky's death, according to the medical examiner, was the head injuries. The mechanical asphyxia was a contributing factor.

Wisnosky was a 17-year-old Caucasian and a student in her first year at Old Dominion University (ODU). Nicki Vanbelkum, Wisnosky's dormitory roommate, last saw Wisnosky alive on the afternoon of September 21, 1993. Vanbelkum and Wisnosky had planned to meet later that day, but Wisnosky did not appear.

Barnabei, also a Caucasian, first arrived in the Norfolk-Virginia Beach area in August 1993. He identified himself to others as "Serafino" or "Serf" Barnabei and claimed to have been a member of the Tau Kappa Epsilon (TKE) fraternity at Rutgers University.[3] Soon thereafter, Barnabei began to associate with members of TKE at ODU. He rented a

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[2] The medical examiner defined "petechiae" as small pinhead-sized hemorrhages of the capillaries.

[3] This claim proved to be false. Although Barnabei at one time had been a TKE pledge at Stockton State College in New Jersey, he never became a member of the fraternity.

room in a house that was occupied by four other young men, who were either past or present students at ODU.

Barnabei became acquainted with Wisnosky, and the two attended a number of functions at the rooming house. On several occasions, Wisnosky spent the night with Barnabei.

On one of those occasions, Wisnosky and Vanbelkum went to Barnabei's rooming house for a "toga party," conducted by the TKE fraternity. Wisnosky became intoxicated and refused to leave the party with Vanbelkum. Barnabei appeared to shun Wisnosky throughout the party, and he told Thomas Walton, a TKE member, to "keep [Wisnosky] away from him because he was trying to hook up with someone else." Walton and Daniel Paul Wilson, another student, kept Wisnosky company on the front porch of the house. When Walton and Wilson asked Wisnosky about her relationship with Barnabei, she remarked, "He is all right, but I have had better." About 5:00 a.m., Walton left Wisnosky asleep in Barnabei's bed, and, later that morning, Wisnosky returned to her dormitory room without incident.

The following day at a fraternity meeting, when Barnabei "was bragging about his sex life" and Walton told those in attendance about Wisnosky's remark, Barnabei became agitated. When those present began to laugh and tease him, he denied that he had had sexual intercourse with Wisnosky, stating that they had had only oral sex.

On September 22, 1993, about 1:00 a.m., William Rolland Gee, III, a TKE pledge, drove Barnabei from a TKE pledge meeting to Barnabei's rooming house. Wisnosky was in Barnabei's room when Gee departed about 45 minutes later.

Sometime in the early hours of September 22, Michael Christopher Bain, who lived in the bedroom directly above Barnabei's, began hearing very loud music emanating from Barnabei's room. Bain first stomped on the floor in an unsuccessful effort to get Barnabei to reduce the volume of the music. Bain and David Wirth, another roomer in the house, then went downstairs. They pounded on Barnabei's door for about

five minutes, but no one answered, and they tried to open the door, but it was locked.

Meanwhile, Troy Manglicmot, another occupant of the house, was suddenly awakened when Barnabei rushed into his room. Speaking in a "strong, forceful tone," Barnabei demanded that Manglicmot move his vehicle because it was blocking Barnabei's car in the driveway next to the house. Barnabei took Manglicmot's car keys, but he could not start the vehicle. Manglicmot then moved his vehicle, and Barnabei began to back his car out of the driveway. After striking the side of the house next door and nearly colliding with Manglicmot's vehicle and Wirth's truck, Barnabei "pulled out real fast" onto the street and drove away.

That same morning, about 2:30 a.m., Justin Dewall, another roomer in the house, returned to the house and was unable to find his dog. In the course of looking through the house for the dog, he knocked on Barnabei's door. When Barnabei opened the door slightly, Dewall observed that Barnabei was "stark naked" and that Barnabei's face was expressionless. Barnabei appeared "wide-eyed, open-mouthed, and he wasn't focusing on [Dewall] when he was looking at [him]."

When Wirth left the house about 7:30 that morning, he saw Barnabei asleep on a couch in the living room. Wirth asked Barnabei why he was not sleeping in his room, and Barnabei responded that "it was a long, f___ed-up story." As Wirth walked to his truck, he found a shoe near the rear of Barnabei's car. Wirth threw the shoe, which was later identified as belonging to Wisnosky, toward the back porch.

About 9:30 a.m., Barnabei telephoned Eric Scott Anderson, another TKE pledge, and asked Anderson to bring him a blanket. When Anderson arrived at Barnabei's door, he noticed that Barnabei's waterbed, unlike on a past occasion, had no bed sheets.

In the early afternoon of September 22, Barnabei was seen by Dewall's girlfriend carrying a duffle bag and a surfboard from his

bedroom. About 2:45 that afternoon, Barnabei offered Richard Patton, a TKE pledge, a ride to a fraternity sporting event. Before departing, Barnabei told Patton that he had been carrying a surfboard in his car and asked if Patton could take it to his room "because he was tired of carrying it around in his car." Patton took the surfboard to his room and put it in a closet. Upon leaving in Barnabei's car, Patton noticed "a really bad smell." Barnabei told him that the smell probably came from his "bag of laundry," a large, closed duffle bag, in the backseat of the car. Also during that afternoon, Barnabei borrowed, or tried to borrow, money from Patton and others.

About 5:30 or 6:00 p.m., he called Anderson and asked if Anderson had "heard anything." When Anderson inquired as to what Barnabei was referring, Barnabei replied, "[L]ike, oh, nothing." Barnabei then stated that he was "going away for a couple days to work with [his] dad." Barnabei went to Towson, Maryland and later to Ohio, where he was arrested in December 1993.

On September 23, several police officers went to Barnabei's rooming house, where they recovered Wisnosky's other shoe, which appeared to be bloodstained. They also recovered a pair of white socks from atop a trash can beside the house and a towel from the rear of the house next door. The towel exhibited dark red stains.

After interviewing the occupants of the house, the police obtained a search warrant and proceeded to search Barnabei's room, which "appeared to have been abandoned." The police found stains on Barnabei's waterbed and on one of the bedroom walls, and a damp, red stain was discovered beneath a carpet. Stains also were found on the surfboard which was retrieved from Patton's bedroom. In addition, the police recovered a handwritten note which stated, "Women just don't get it."

A state forensic serologist found sperm on Wisnosky's vaginal swabs. She also found blood underneath Wisnosky's fingernails, on one of her shoes, on the surfboard, and on the washcloth and towel, and hairs and fibers on the socks, towel, and washcloth.

A state DNA analyst conducted an RFLP DNA analysis of various samples.[4] She testified that blood recovered from the waterbed frame matched that of Wisnosky and that the chances were one in 202,000 that the blood came from a Caucasian other than Wisnosky. She also stated that the chances were one in 972 million that Barnabei did not contribute the sperm found on the vaginal swabs. The analyst also determined that the stain found under the carpet in Barnabei's room was human blood.

Another DNA analyst conducted a PCR DNA analysis of various samples.[5] She determined that the blood recovered from the surfboard, shoe, wall, and waterbed was consistent with Wisnosky's blood type. She testified that only 3.9 percent of the Caucasian population has the "HLA DQα type" found in these samples. She also stated that the sperm fraction recovered from the vaginal swabs was consistent with Barnabei's blood type and that only 1.9 percent of the Caucasian population has the HLA DQα type found in this sample.

An expert on hair and fiber analysis determined that the socks recovered contained four pubic hairs. These hairs were similar to samples taken from Wisnosky and dissimilar to Barnabei's samples "in all identifiable microscopic characteristics."

III

PRETRIAL MATTERS

A

Pretrial, Barnabei filed a motion in limine seeking to prohibit the medical examiner, who performed the autopsy, from giving an opinion whether "force was used to inflict any of the injuries

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[4] For a detailed explanation of DNA print identification, *see Spencer v. Commonwealth*, 238 Va. 275, 286-89, 384 S.E.2d 775, 781-82 (1989), *cert. denied*, 493 U.S. 1036, 110 S.Ct. 759, 107 L.Ed.2d 775 (1990).

[5] For a detailed explanation of PCR DNA amplification, *see Spencer v. Commonwealth*, 240 Va. 78, 96, 393 S.E.2d 609, 620, *cert. denied*, 498 U.S. 908, 111 S.Ct. 281, 112 L.Ed.2d 235 (1990).

to the vagina or anus of the victim." Barnabei asserted that such testimony would invade the province of the jury on the ultimate issue whether Wisnosky was the victim of rape.

At a hearing on the motion, the medical examiner testified that he had found vaginal bruising and that such bruising could have been caused only by "forcible penetration of the vagina." He also said that there were various possible explanations for his findings and that he used the term "force" in a medical sense.

The examiner also testified that he had found a tear of the anus and stretching of the anal opening, which indicated to him that "forcible anal penetration" had occurred "within the past several hours prior to [the victim's] death." The examiner reemphasized, however, that he only could say "medically" that force had been used and that it was not for him to say "[w]hether a person would consent to force being used."

At the conclusion of the medical examiner's pretrial testimony, and based upon the Commonwealth's Attorney's "representations" regarding what the evidence would show, Barnabei's counsel informed the trial court that "there [was] no immediate [need] to argue the motion." Consequently, the trial court denied the motion in limine.

At trial, the medical examiner gave lengthy testimony about the autopsy and his findings. Among other things, he testified that the vaginal bruising was caused by a "violent penetration of that area."

On appeal, Barnabei claims that the medical examiner's trial testimony differed from his pretrial testimony and that the testimony given at trial invaded the province of the jury on an ultimate issue of fact. The record shows, however, that, during the trial, Barnabei never objected to any of the examiner's testimony. Consequently, Barnabei's claim has been procedurally defaulted. Rule 5:25.

B

Barnabei contends that the trial court erred in refusing to appoint a forensic pathologist to assist in his defense and to rebut the medical examiner's testimony about Wisnosky's bruises and other injuries because the only evidence of rape adduced at trial was the medical examiner's testimony. He asserts that the Supreme Court's holding in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53, dictates this result.

We addressed a similar contention in *Husske v. Commonwealth*, 252 Va. 203, __, 476 S.E.2d 920, __ (1996) (this day decided), wherein we said that, in certain circumstances, the Due Process and Equal Protection Clauses of the Constitution of the United States require the appointment of an expert, at the Commonwealth's expense, to assist an indigent defendant in his defense. We made clear, however, that an indigent defendant's constitutional right to the appointment of an expert is not absolute. We held, instead, that

> an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is "likely to be a significant factor in his defense," *Ake*, 470 U.S. at 82-83 [105 S.ct. at 1096], and that he will be prejudiced by the lack of expert assistance. *Id.* at 83 [105 S.Ct. at 1096]. An indigent defendant may satisfy this burden by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial.

Id. at __, 476 S.E.2d at 925.

Thus, an indigent defendant seeking the appointment of an expert has the burden of showing a particularized need therefor. The required showing must be determined on a case-by-case basis, and a determination whether an adequate showing has been made is a matter that rests within a trial court's discretion. *Id.* at __, 476 S.E.2d at 925.

We think that, in the present case, Barnabei failed to make the particularized showing that would have entitled him to the appointment of an expert forensic pathologist at the Commonwealth's expense. At most, Barnabei hoped or suspected that an expert might testify that the injuries to Wisnosky's vagina and anal opening did not necessarily result from force. A hope or suspicion that favorable evidence may be procured from an expert, however, is not sufficient to require the appointment of an expert. Clearly, therefore, the trial court did not abuse its discretion in denying Barnabei's request. *Id.* at __, 476 S.E.2d at 925.

C

Barnabei also contends that the trial court erred in denying his motion for a bill of particulars specifying the evidence upon which the Commonwealth intended to rely in seeking the death penalty. He contends on appeal that the trial court's refusal to order the bill of particulars denied him his constitutional due process right to notice and an opportunity to defend against the death penalty.

When Barnabei presented argument before the trial court, however, he did not assert a constitutional basis for his motion. Instead, he "move[d] the Court *in its discretion* to order the Commonwealth to furnish [him] a bill of particulars." (Emphasis added.) Consequently, his constitutional argument is procedurally defaulted. Rule 5:25.

D

Barnabei further contends that the Commonwealth suppressed certain exculpatory evidence thereby depriving him of a fair trial. On brief, however, Barnabei makes many conclusional assertions that are either procedurally defaulted or meritless. Only one contention warrants discussion.

Barnabei filed a motion seeking all witness statements, which had been taken by the police, concerning the nature of his sexual relationship with Wisnosky. After an *in camera* examination of

the statements, the trial court permitted Barnabei to examine two of five pages of one individual's statement. The trial court determined that the remaining statements were not exculpatory and sealed them.[6]

We have examined the sealed statements and find that one undisclosed statement, made by Michael Bain, appears to be equally as exculpatory as the one revealed. Bain stated that he heard Barnabei ask Wisnosky if she liked anal intercourse and that Wisnosky smiled and nodded her head affirmatively.

At trial, however, Bain, a Commonwealth's witness, testified about the same incident during both direct examination and cross-examination. Consequently, we hold that, assuming the trial court erred in sealing Bain's statement, the disclosure at trial of the incident made any such error harmless beyond a reasonable doubt.

IV

JURY MATTERS

Barnabei contends that the trial court erred in removing for cause prospective jurors Charles Bazzell and Mary Howell.

During *voir dire*, Bazzell advised the court that he had "an opinion [that] would prevent [him] from convicting anyone of an offense which is punishable with death." Upon further questioning, he told the court that he "[did] not believe in the death penalty." In response to a question from defense counsel, however, Bazzell stated that there were crimes, such as the Oklahoma City bombing, for which he would consider imposition of the death penalty. He said he thought it was "possible" that his beliefs would prevent or substantially impair his ability to

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[6] The statement which the court permitted Barnabei to examine was that of Thomas Walton. Walton stated that he had asked Wisnosky about her sexual relations with Barnabei and that Wisnosky had replied, "He was good, but I've had better."

follow the court's instructions, but he would not know until he heard the evidence. Finally, he conceded that his personal opposition to the death penalty "would make it difficult for [him] to consider the Court's instructions" requiring him to consider imposition of a death sentence.

Also during *voir dire*, Howell, a member of the Maryland Bar, initially told the court that she had beliefs "which would prevent [her] from voting or substantially impair [her] ability to vote for imposition of the death penalty upon an individual convicted of capital murder." Later, she said her beliefs would not prevent or hinder her consideration of the death penalty "under the appropriate circumstances." Subsequently, however, in response to questioning by the court, she again stated that her beliefs would prevent or substantially impair her from voting to impose the death penalty, adding, "I am opposing the death penalty." She admitted that she was "not answering clearly" and that her *voir dire* "may sound conflicting."

The appropriate standard for determining when a prospective juror may be excluded for cause because of the juror's views about the death penalty is whether the juror's views would substantially impair or prevent the performance of his duties as a juror in accordance with his oath and the court's instructions. *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). Application of this standard rests within the sound discretion of the trial court, and its ruling to exclude a prospective juror will not be disturbed on appeal unless the ruling constitutes manifest error. *Yeatts v. Commonwealth*, 242 Va. 121, 134, 410 S.E.2d 254, 262 (1991), *cert. denied*, 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). The trial court is accorded such deference because it sees and hears the prospective jurors. *Weeks v. Commonwealth*, 248 Va. 460, 475, 450 S.E.2d 379, 389 (1994), *cert. denied*, __ U.S. __, 116 S.Ct. 100, 133 L.Ed.2d 55 (1995); *Pope v. Commonwealth*, 234 Va. 114, 123-24, 360 S.E.2d 352, 358 (1987). Finally, in determining whether a prospective juror should have been excluded for cause, we review the entire *voir dire*, rather than a single question and answer. *Fitzgerald v. Commonwealth*, 223

Va. 615, 628, 292 S.E.2d 798, 805 (1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1235, 75 L.Ed.2d 469 (1983).

When we examine the entire *voir dire* of Bazzell and of Howell in light of the foregoing principles of law, we cannot say that the trial court committed manifest error in excluding them for cause. Indeed, we think the trial court reasonably concluded that both these prospective jurors were opposed to the death penalty and that their views would have prevented or substantially impaired their performances as jurors in accordance with their oaths and the court's instructions.

V

GUILT PHASE

Barnabei contends that the evidence is insufficient to support the jury's finding that he raped Wisnosky and, therefore, that he cannot be found guilty of capital murder. More specifically, he asserts that "there was literally no evidence of his having forced or used the threat of force to engage in sexual relations with [Wisnosky]." We do not agree.

The evidence clearly supports the finding that Barnabei and Wisnosky had sexual intercourse prior to Wisnosky's death. The sperm found on Wisnosky's vaginal swabs was consistent with Barnabei's blood type, and the chances were one in 972 million that someone other than Barnabei contributed the sperm. The evidence also supports the finding that Barnabei used force or the threat of force. The medical examiner found bruising on the introitus of Wisnosky's vagina and tearing of her anal opening, and he testified that the bruising was caused by "violent penetration." The examiner also found bruising on the abdomen, and he testified that the bruising could have been caused by the assailant's kneeling on Wisnosky "to hold [her] in place." When this evidence is considered in conjunction with Wisnosky's other brutal injuries, we hold that the evidence clearly supports the jury's finding that Wisnosky had been raped.

VI

PENALTY PHASE

A

Seven witnesses testified in the penalty phase of the trial. The Commonwealth called Sandra Ann Joaquin and Paula Barto; Barnabei presented Charles A. Parker, Harvey L. Smith, Carla DiSantis, Craig Barnabei, and Shannon Moore McHale.[7]

Joaquin testified that she had had an "[o]n and off" romantic relationship with Barnabei during 1989 and 1990, while they were students at Stockton State College, in New Jersey. On a number of occasions, Barnabei had been "physically violent" with her. On one occasion, he had "head butted" Joaquin approximately three times, resulting in her seeking treatment for a concussion. On another occasion, Barnabei had thrown her against a wall and grabbed her tightly by the throat. Another time, he had kicked her "between the legs," "grabbed" her, and "smacked" her head. Although Barnabei had threatened to kill Joaquin if she complained to the police, she finally filed "harassment charges" against him. She ultimately agreed to drop the charges in exchange for Barnabei's agreeing to leave her alone.

Barto, Barnabei's former wife, also testified about his aggressive behavior. She recounted that he had slapped her face hard enough to leave "marks," had thrown her against a wall, and had forced her to have anal intercourse against her will. Barnabei

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[7] Barnabei also called Dr. David Ray Faber, II, "a specialist in adult general psychiatry and forensic and administrative psychiatry," who had been appointed by the trial court to perform various psychological examinations on Barnabei. Dr. Faber testified, out of the jury's presence at Barnabei's request, that he did not find any "psychological mitigating factors that could be presented to the jury." He also testified that he did not find anything to indicate that Barnabei was suffering from any type of mental disease or defect that the jury could consider in mitigation of Barnabei's punishment.

had told Barto that, if she ever left him. he would find and kill her. Barto finally left Barnabei on June 24, 1988, and, thereafter, Barnabei left many threatening telephone messages on her parents' answering machine. In one message, he said that he was going to burn her father's business.

Parker, the mayor of Somers Point, New Jersey, a city of about 12,000 citizens, testified that he was familiar with the Barnabei family. He knew Barnabei as a young, grade school boy when Barnabei received an academic award. However, he had not seen Barnabei for "probably four or five years."

Smith, a councilman in Somers Point, testified that he had known the Barnabei family socially since 1979. He recalled that Barnabei "was one of the talented, gifted students" and that Barnabei received an award when he finished the eighth grade. However, he also had not seen Barnabei for "several years."

DiSantis testified that she had first become acquainted with Barnabei in July 1993, and, in the fall of that year, they had begun to date. In December 1993, they began living together in an apartment in Cuyahoga Falls, Ohio. She and Barnabei worked in the same restaurant. Barnabei was the "floor manager," and he worked "[e]very day." They continued to live together until Barnabei was arrested. DiSantis also testified that she and Barnabei were "intimate" and "had relations." She stated that Barnabei was never aggressive with her, never struck her, and was "very sweet, very tender, always loving." She never had any "physical difficulties [with Barnabei] in [their] intimate relationship."

Craig Barnabei, the defendant's only sibling, testified about his relationship with the defendant, who is two years younger than Craig. He said that the two always had a close relationship. As children, they were in the "gifted and talented program." When they were older, they " double-dated" on occasions, and he noted that girls seemed to have a " particular interest" in his brother. Craig further testified that the defendant had been popular with other children and that he defended those who were being bullied. Craig never saw his brother be abusive to anyone.

McHale, one of Barnabei's former girlfriends, testified that, during 1993 and before Barnabei left New Jersey, she and Barnabei had been "lovers and best friends." She never had any "physical problems" with him, and he was never abusive or rude to her, even though she purposely tried to provoke him on an occasion.

B

Barnabei contends that the trial court erred in refusing to instruct the jury that he would not be eligible for parole for at least 25 years. He asserts that the Supreme Court's rationale in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), applies to his case. We disagree.

Simmons applies only to capital defendants who are ineligible for parole. Barnabei is not parole-ineligible. *See, e.g., Roach v. Commonwealth*, 251 Va. 324, 336, 468 S.E.2d 98, 111 (1996); *Joseph v. Commonwealth*, 249 Va. 78, 84, 452 S.E.2d 862, 866, *cert. denied*, ___ U.S. ___, 116 S.Ct. 204, 133 L.Ed.2d 137 (1995); *Fitzgerald v. Commonwealth*, 249 Va. 299, 306-07, 455 S.E.2d 506, 510-11 (1995), *cert. denied*, __ U.S. __, 116 S.Ct. 1279, 134 L.Ed.2d 224 (1996).

C

Barnabei also contends that the trial court erred in refusing proposed jury instructions B, C, and D, which relate to mitigating factors and sentence alternatives. Again, we do not agree. We conclude that the refused instructions, to the extent they accurately stated the law, were unnecessary in view of the instructions given.[8] Indeed, the instructions given by the trial court were virtually identical to those we previously have

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[8] Instruction B was obviously improper because it would have incorrectly told the jury that Barnabei had "no significant history of prior criminal activity" and that "[t]he victim consented to the act" of intercourse.

affirmed. *See, e.g., Gray*, 233 Va. at 350-51, 356 S.E.2d at 178.

D

Two of Barnabei's contentions regarding certain rulings of the trial court in the penalty phase are procedurally defaulted. Although Barnabei contends on appeal that the instructions regarding the "vileness" and "future dangerousness" predicates were vague and incomplete, he did not object when the instructions were given. Therefore, we cannot consider this contention. Rule 5:25.

Barnabei also contends on appeal that it is unclear from the jury's verdict whether it based its verdict upon one or both of the aggravating factors because the verdict contains the term "and/or." Thus, he asserts, the verdict "is not meaningfully or rationally reviewable." Again, however, Barnabei did not object to the verdict when it was returned by the jury or when judgment was entered thereon. Thus, this contention is procedurally defaulted. Rule 5:25.[9]

E

Prior to trial, Barnabei filed a motion pursuant to Code § 19.2-264.3:2 to require the Commonwealth to provide notice of any unadjudicated criminal conduct which it intended to present in the penalty phase. Code § 19.2- 264.3:2 provides, in pertinent part, the following:

> Upon motion of the defendant, in any case in which the offense for which the defendant is to be tried may be punishable by death, if the attorney for the Commonwealth intends to introduce during a sentencing proceeding held

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[9] Also defaulted are Barnabei's generalized claims that the trial court treated him unfairly and was biased in favor of the Commonwealth. Further, we find no merit to the claim that the court had an *ex parte* communication with the Commonwealth's witness, Michael Bain.

> pursuant to § 19.2-264.4 evidence of defendant's unadjudicated criminal conduct, the attorney for the Commonwealth shall give notice in writing to the attorney for the defendant of such intention. The notice shall include a description of the alleged unadjudicated criminal conduct and, to the extent such information is available, the time and place such conduct will be alleged to have occurred.

Approximately three weeks prior to trial, the Commonwealth filed a 12-page notice, detailing numerous incidents of unadjudicated criminal conduct which it intended to present. The notice alleged, *inter alia*, that, during the time that Barnabei had been married to Paula Barto, he had "engaged in a continuous course of threatening and assaultive conduct against [her], said conduct occurring on such a continuous and regular basis that [she could not] recall each and every specific date and occasion upon which such threatening and assaultive conduct occurred."

During the penalty phase of the trial, Barto testified about her marriage to Barnabei and about various threats and acts of violence he had inflicted upon her. During her testimony, Barto related one incident when Barnabei had attempted to have anal intercourse with her, but she successfully had resisted the attempt. Barnabei then objected and moved for a mistrial, asserting that the Commonwealth's notice had not adequately apprised him of that specific incident. The trial court overruled the objection, and Barto further testified, over Barnabei's renewed objection, that Barnabei had forced her to have sexual intercourse with him on other occasions.

Barnabei contends on appeal that the trial court erred in allowing Barto to testify about incidents that were not specifically alleged in the notice. We do not agree. We think the Commonwealth's allegations that Barnabei engaged in "assaultive conduct" against Barto and that Barto could not recall "each and every . . . occasion" were sufficient to allow the admission of her testimony. Moreover, the ruling rested within the trial court's sound discretion, and, clearly, the court did not abuse its discretion in admitting the testimony.

F

Barnabei asserts that, to the extent his sentence was based upon a finding of either "vileness" or "future dangerousness," "it was in violation of [his] rights as guaranteed by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution" and that each predicate "of the Virginia death penalty statute was unconstitutionally used and found by the sentencer." We interpret Barnabei's assertion to be that his sentence should be vacated because the aggravating factors set forth in the capital murder statute are unconstitutionally vague.

We previously have rejected this contention. *See, e.g., Joseph*, 249 Va. at 82-83, 452 S.E.2d at 865-66; *Breard v. Commonwealth*, 248 Va. 68, 74, 445 S.E.2d 670, 675, *cert. denied*, __ U.S. __, 115 S.Ct. 442, 130 L.Ed.2d 353 (1994). Adhering to our previous holdings, we again reject the contention.[10]

VII

SENTENCE REVIEW

Code § 17-110.1(C) requires this Court to review Barnabei's death sentence to determine whether the sentence (1) was imposed under the influence of passion, prejudice, or any other arbitrary factor; or (2) is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. We conduct this review even though Barnabei makes no claim that his sentence was the product of any arbitrary factor or that it is excessive or disproportionate.

From our independent review of the record, we have found nothing to suggest that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

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[10] Although Barnabei does not explain why the evidence is insufficient to prove either statutory aggravating factor, we conclude, nonetheless, that the jury's finding in that regard is fully supported by the evidence.

Next, in considering whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, we must determine whether other sentencing bodies in this jurisdiction generally impose the death penalty for comparable or similar crimes, considering both the crime and the defendant. *Roach*, 251 Va. at 350, 468 S.E.2d at 113. Consequently, we have compiled and examined the records of all capital murder cases reviewed by this Court, Code § 17-110.1(E), including both cases in which the death sentence was imposed and cases in which life imprisonment was imposed. In doing so, we have given particular attention to those cases in which the death sentence was based upon both the "vileness" and the "future dangerousness" predicates.

From this review, we conclude that Barnabei's death sentence is neither excessive nor disproportionate to penalties generally imposed by other sentencing bodies in the Commonwealth for similar and comparable crimes. *See, e.g., Goins v. Commonwealth*, 251 Va. 442, 469-70, 470 S.E.2d 114, 132 (1996); *Sheppard v. Commonwealth*, 250 Va. 379, 395, 464 S.E.2d 131, 141 (1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1332, 134 L.Ed.2d 483 (1996); *Graham v. Commonwealth*, 250 Va. 79, 89, 459 S.E.2d 97, 102, *cert. denied*, ___ U.S. ___, 116 S.Ct. 535, 133 L.Ed.2d 440 (1995); *Breard*, 248 Va. at 89, 445 S.E.2d at 682; *Spencer*, 238 Va. at 318-20, 384 S.E.2d at 799-800.

VIII

CONCLUSION

We have considered all issues discussed in Barnabei's brief and find no reversible error. After conducting the sentence review pursuant to Code § 17-110.1, we hold that the capital murder conviction and the sentence of death should be affirmed. Accordingly, we will affirm the trial court's judgments.

Record No. 952168—*Affirmed.*

Record No. 952169—*Affirmed.*

APPENDIX B

SUPREME COURT OF VIRGINIA.

Paul Josef HUSSKE

v.

COMMONWEALTH of Virginia.

Record No. 951880.

Sept. 13, 1996.

Present: CARRICO, C.J., COMPTON, STEPHENSON, LACY, HASSELL and KEENAN, JJ., and POFF, Senior Justice.

HASSELL, Justice.

The primary issue we consider in this appeal is whether an indigent defendant has made the particularized showing necessary to require the Commonwealth, under the Due Process and Equal Protection clauses of the Fourteenth Amendment of the federal Constitution, to supply at its expense a DNA expert to assist the defendant.

I

Paul Josef Husske was convicted in a bench trial of breaking and entering with intent to commit rape and the offenses of forcible sodomy, rape, and robbery. He was sentenced as follows: 20 years' imprisonment, suspended after serving 10 years, for breaking and entering with the intent to commit rape; 20 years' imprisonment, suspended after serving 10 years, for forcible sodomy; 40 years' imprisonment, suspended after serving 20 years, for rape; and 10 years' imprisonment, suspended after serving five years, for robbery.

The defendant appealed to the Court of Appeals, and a panel of that Court reversed the judgment of the trial court. The panel held that the defendant had a constitutional right to the appointment of a DNA expert at the Commonwealth's expense to assist him, and that the trial court erred by admitting in evidence

certain statements that the defendant had made to mental health workers. *Husske v. Commonwealth*, 19 Va.App. 30, 448 S.E.2d 331 (1994). The Court of Appeals granted the Commonwealth's petition for a rehearing *en banc*, vacated the panel's judgment, and, by an equally divided Court, affirmed the judgment of the trial court. *Husske v. Commonwealth*, 21 Va.App. 91, 462 S.E.2d 120 (1995). We awarded the defendant an appeal.

II

The victim, a young woman, lived in an apartment complex in Henrico County. One night as she was asleep in bed, she was awakened by being struck in the face with a hard object. She observed that her assailant, who was wearing a stocking over his face, was a white male with brown hair. He wore fabric gloves and threatened to kill her unless she was quiet. She recognized the attacker's voice because, on several earlier occasions, he had placed telephone calls to her home and left sexually obscene comments recorded on her telephone answering machine.

The assailant forced the victim to commit an act of oral sodomy upon him. He then placed a knife against her throat, and he moved the blade of the knife over her breasts, stomach, and toward her genital area. He committed an act of oral sodomy upon her and then raped her.

The assailant directed the victim "to go to her bathroom and shower." She turned on the water, but she did not bathe. The assailant took a purse, containing about $500 in cash, from the victim's room.

After the attacker fled, the victim went to her neighbors' apartment. Police officers were summoned, and the victim was taken to a hospital where a physical evidence recovery kit was prepared. Hospital personnel used swabs to take specimens from the victim's mouth, upper thigh, vulva, and vaginal vault. A nurse also extracted blood from the victim which, along with the specimens, were placed in sealed containers and given to a police investigator, who took them to a laboratory for testing.

About four months after the victim was assaulted, a Henrico County police officer saw the defendant standing near the rear of an apartment located about 200 feet from the victim's apartment. The officer arrested the defendant and charged him with two "peeping tom" offenses.

Two days after his arrest, the defendant voluntarily contacted the Henrico County Mental Health and Retardation Services offices. An intake referral form was completed, and a notation was made on that form that the defendant had been referred by an attorney. The form contained a place to mark whether the contact was court ordered. A block containing the word "no" was marked.

On October 17, 1990, Ann C. Creed, an employee of Henrico County Mental Health and Retardation Services, completed a "Brief Evaluation Form and Client Data Form" for the defendant. Creed noted on the form that the defendant was depressed and chronically suicidal, and that his condition was exacerbated by his arrest on the "peeping tom" charges. The defendant stated that even though this was his first arrest on such a charge, he had been engaging in this behavior for 20 years and had gone "one step further." He told Creed that he felt shame about his behavior and that he was "not worried about court involvement but [was] concerned over family's reaction to learning of his behavior."

The defendant appeared in the Henrico County General District Court on October 31, 1990, and pled guilty to the "peeping tom" offenses. He was sentenced on each charge to 12 months in jail with 12 months suspended, conditioned upon being of good behavior and keeping the peace for five years, and monitoring by the Community Diversion Incentive Program. The defendant was also required to continue participation in the Henrico County Mental Health and Retardation Services treatment program as a condition of his suspended sentence.

On November 9, 1990, the defendant met with Dr. Michael Elwood, an employee of Henrico County Mental Health and Retardation Services. Dr. Elwood and the defendant discussed

the defendant's arrest on the "peeping tom" charges and the problems the arrest had caused with the defendant's marriage.

The defendant met with Dr. Elwood on December 28, 1990, for "a suicide screening." The defendant had attempted suicide a week earlier. Dr. Elwood made arrangements for the defendant to be admitted on a voluntary basis to a hospital. The defendant's wife, who was present at this meeting, told the defendant that he should tell Dr. Elwood "what else was troubling him." The defendant's wife left, and Dr. Elwood asked the defendant about his wife's comments. The defendant stated that he had attempted rapes in the past and that he had "completed a rape." Dr. Elwood did not question the defendant about the crimes at that time.

The defendant remained in the hospital for a few weeks, and Dr. Elwood did not contact him. Dr. Elwood met with the defendant on January 17, 1991. During that session, the defendant told Dr. Elwood that the defendant had attempted three rapes in the midwest and that he had "completed a rape" in the Richmond area about six months earlier in the same complex where he had been arrested for "peeping." The defendant said that he had watched the victim for several days before he raped her, and he conveyed to Dr. Elwood the details of his "successful rape." The defendant mentioned that he had used a rubber mallet to stun his victim, that he had pulled her nightclothes over her head, and that he ordered her "to shower" after the attack. Dr. Elwood did not insist upon details from the defendant, but listened to his statements.

Dr. Elwood recommended that the defendant be considered for participation in a sexual offenders' group. Subsequently, Dennis K. Kilgore and Patricia L. Winterberger, employees of Henrico County Mental Health and Retardation Services, evaluated the defendant. Dr. Elwood was present and did not observe anyone threaten or coerce the defendant during the session. The defendant essentially made the same statements about the "completed rape" to Kilgore and Winterberger that he had made to Dr. Elwood. The defendant's incriminating statements were

subsequently communicated to the police, and he was arrested and charged for these offenses.

III

Several months before trial, the defendant filed a motion asserting his indigency and requesting that the trial court appoint an expert, at the Commonwealth's expense, to help him challenge the DNA evidence that the Commonwealth intended to use. The trial court denied the motion. Two months later, the defendant renewed his motion for the appointment of an expert. He attached an affidavit from an attorney, William T. Linka, who had read extensively on the subject of DNA and who held himself out as an attorney familiar with issues surrounding the forensic applications of DNA technology. Even though the trial court denied the defendant's motion, the court appointed Linka as co-counsel to assist the defendant.

On the morning of trial, the defendant again asserted that he was entitled to the appointment of an independent defense expert in the forensic applications of DNA science and technology. The trial court informed the defendant's counsel that it had appointed Linka to serve as co-counsel for the defendant because the defendant's primary counsel had represented to the court that Linka was "the most knowledgeable member of the local bar in the area of forensic DNA application." The trial court denied the defendant's request for the appointment of a DNA expert at the Commonwealth's expense.

Marion S. Vanti, an employee of the Commonwealth's Division of Forensic Science, and Dr. Bruce Spencer Weir, a Professor of Statistics and Genetics at North Carolina State University, testified at trial for the Commonwealth as expert witnesses on the subject of DNA analysis. Both witnesses testified that the defendant's DNA profile matched the profile of the individual who had attacked the victim. Vanti testified that the DNA analysis did not exclude the defendant as a contributor of the genetic material that the assailant left on the victim's body and clothing. She further stated that the statistical probability of randomly selecting a person unrelated to the defendant in the

Caucasian population with the same DNA profile was 1 in 700,000. Weir also testified that the likelihood of a randomly selected Caucasian bearing the same DNA profile as the defendant was 1 in 700,000.

The defendant, relying principally upon *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), asserts that the Due Process and Equal Protection clauses of the Fourteenth Amendment required that the trial court appoint, at the Commonwealth's expense, an expert to help him challenge the Commonwealth's forensic DNA evidence. The Commonwealth asserts that the defendant has no constitutional right under the Due Process or Equal Protection clauses for the appointment, at the Commonwealth's expense, of a DNA expert.

In *Ake*, the Supreme Court considered whether an indigent defendant has a constitutional right to a psychiatric examination and psychiatric assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time he committed the criminal offense is seriously in question. The Court stated:

> "This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."

Id. at 76, 105 S.Ct. at 1092. The Supreme Court, holding that an indigent defendant is entitled to the appointment of a psychiatrist to assist him in his defense, explained its rationale:

> "We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally

> unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross v. Moffitt*, 417 U.S. 600 [94 S.Ct. 2437, 41 L.Ed.2d 341] (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system,' *id.*, at 612 [94 S.Ct. at 2444-45]. To implement this principle, we have focused on identifying the 'basic tools of an adequate defense ...' *Britt v. North Carolina*, 404 U.S. 226, 227 [92 S.Ct. 431, 433, 30 L.Ed.2d 400] (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them."

Id. at 77, 105 S.Ct. at 1093. The Supreme Court concluded that the Due Process clause's guarantee of fundamental fairness is implicated

> "when [an indigent] defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, [and that in such circumstances] the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

Id. at 83, 105 S.Ct. at 1096.

In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court noted that a trial court had properly denied an indigent defendant's requests for the appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, and also that the Supreme Court of Mississippi properly affirmed the trial court's decision because the defendant's requests were accompanied by no showing of reasonableness. The Supreme Court stated:

> "[T]he defendant's request for a ballistics expert included little more than 'the general statement that the requested expert "would be of great necessarius witness."' . . . Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision. . . . We therefore have no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type here sought."

Id. at 323 n. 1, 105 S.Ct. at 2637 n. 1.

Our research reveals that most courts which have considered the question whether an indigent defendant is entitled to the appointment of a non- psychiatric expert have applied the rationale articulated in *Ake*, and, those courts have held that the Due Process and Equal Protection clauses require the appointment of non-psychiatric experts to indigent defendants depending upon whether the defendants made a particularized showing of the need for the assistance of such experts. *See, e.g., Little v. Armontrout*, 835 F.2d 1240, 1243-44 (8th Cir.1987), *cert. denied*, 487 U.S. 1210, 108 S.Ct. 2857, 101 L.Ed.2d 894 (1988); *Moore v. Kemp*, 809 F.2d 702, 709-12 (11th Cir.), *cert. denied*, 481 U.S. 1054, 107 S.Ct. 2192, 95 L.Ed.2d 847 (1987); *Thornton v. State*, 255 Ga. 434, 339 S.E.2d 240, 241 (1986); *Harrison v. State*, 644 N.E.2d 1243, 1252-53 (Ind.1995); *Kennedy v. State*, 578 N.E.2d 633, 639-40 (Ind.1991), *cert. denied*, 503 U.S. 921, 112 S.Ct. 1299, 117 L.Ed.2d 521 (1992); *State v. Coker*, 412 N.W.2d 589, 592-93 (Iowa 1987); *Polk v. State*, 612 So.2d 381, 393-94 (Miss.1992); *State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412, 424-25 (1994), *cert. denied*, __ U.S. __, 115 S.Ct. 1815, 131 L.Ed.2d 738 (1995); *State v. Mills*, 332 N.C. 392, 420 S.E.2d 114, 117-19 (1992); *Rogers v. State*, 890 P.2d 959, 966-67 (Okla.Crim.App.1995), *cert. denied*, __ U.S. __, 116 S.Ct. 312, 133 L.Ed.2d 215 (1995); *State v. Edwards*, 868 S.W.2d 682, 697-98 (Tenn.Crim.App.1993); *Rey v. State*, 897 S.W.2d 333, 337-38 (Tex.Crim.App.1995).

We are of opinion that *Ake* and *Caldwell*, when read together, require that the Commonwealth of Virginia, upon request, provide indigent defendants with "the basic tools of an adequate defense," *Ake*, 470 U.S. at 77, 105 S.Ct. at 1093, and, that in certain instances, these basic tools may include the appointment of non-psychiatric experts. This Due Process requirement, however, does not confer a right upon an indigent defendant to receive, at the Commonwealth's expense, all assistance that a non-indigent defendant may purchase. Rather, the Due Process clause merely requires that the defendant may not be denied "an adequate opportunity to present [his] claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612, 94 S.Ct. 2437, 2444-45, 41 L.Ed.2d 341 (1974).

Moreover, an indigent defendant's constitutional right to the appointment of an expert, at the Commonwealth's expense, is not absolute. We hold that an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is "likely to be a significant factor in his defense," *Ake*, 470 U.S. at 82-83, 105 S.Ct. at 1096, and that he will be prejudiced by the lack of expert assistance. *Id.* at 83, 105 S.Ct. at 1096. An indigent defendant may satisfy this burden by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial. *See State v. Mills*, 420 S.E.2d at 117. The indigent defendant who seeks the appointment of an expert must show a particularized need:

> "'Mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided.' . . . 'This particularized showing demanded . . . is a flexible one and must be determined on a case-by-case basis.' . . . The determination . . . whether a defendant has made an adequate showing of particularized necessity lies within the discretion of the trial judge."

Id. Accord Caldwell, 472 U.S. at 323-24 n. 1, 105 S.Ct. at 2637 n. 1.

Contrary to the Commonwealth's arguments, we have not specifically held that *Ake* is implicated only in those cases where the defendant's sanity at the time he committed an offense is seriously in question. In *Pope v. Commonwealth*, 234 Va. 114, 360 S.E.2d 352 (1987), *cert. denied*, 485 U.S. 1015, 108 S.Ct. 1489, 99 L.Ed.2d 716 (1988), we rejected an indigent defendant's contention that he had a constitutional right to the appointment, at the Commonwealth's expense, of a private investigator. There, we held that the trial court properly denied the defendant's motion "to appoint an investigator to 'comb the neighborhood' for potential witnesses." *Id.* at 119, 360 S.E.2d at 356.

Although in *Pope* we rejected the defendant's argument that he was entitled to relief in accord with *Ake*, we relied upon *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985), *cert. denied*, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986), in reaching our conclusion. In *Watkins*, we held that consistent with the decisions of the United States Supreme Court, the mere "fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required." *Id.* at 478, 331 S.E.2d at 430 (quoting *Ross v. Moffitt*, 417 U.S. 600, 616, 94 S.Ct. 2437, 2447, 41 L.Ed.2d 341 (1974)). Thus, in *Pope* and *Watkins*, the indigent defendants failed to make the requisite particularized showing of the need for the requested expert assistance.

Here, we are of opinion that the trial court did not err by refusing to appoint a DNA expert witness to assist Husske with the preparation of his defense.* As we previously stated, an

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*We do not consider the defendant's contention that his Sixth Amendment rights of confrontation and compulsory process were abridged. The defendant did not make these arguments in the trial court, and we will not consider them here. Rule 5:25. Additionally, in view of our holding, we need not consider

indigent defendant who seeks the appointment of an expert, at the Commonwealth's expense, must show a particularized need for such services and that he will be prejudiced by the lack of expert assistance. The defendant failed to meet these requirements. At best, the defendant asserted, *inter alia*, that: DNA evidence is "of a highly technical nature;" he thought it was difficult for a lawyer to challenge DNA evidence without expert assistance; and he had concerns about the use of DNA evidence because "the Division of Forensic Science [was] no longer [conducting] paternity testing in [c]riminal cases." The defendant's generalized statements in his motions simply fail to show a particularized need.

Additionally, the defendant failed to demonstrate that he would be prejudiced by the lack of expert assistance. Indeed, he could not make such a showing because, as the evidence of record reveals, he confessed to the crimes, and he described the details of his offenses with great specificity.

We emphasize that the Due Process and Equal Protection clauses do not require the appointment, at the Commonwealth's expense, of an expert witness for every indigent defendant. As the United States Court of Appeals for the 11th Circuit has stated:

> "Requiring trial courts, both state and federal, to provide for expert assistance—through direct appointment or a grant of funds—would place a substantial, if not onerous, burden on the administration of criminal justice. For example, the trial court would have to (1) appoint a defense expert for every expert available to the government; (2) provide for expert assistance whether or not such assistance turned out to be needed; and (3) provide for any additional experts the appointed experts might need to explore theories that could aid the defense in

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defendant's assertion that the trial court abridged his Sixth Amendment right to effective assistance of counsel by refusing to appoint an expert to assist him with the preparation of his DNA defense.

> cross-examining prosecution witnesses or in presenting the defense's case. We question the wisdom of such due process requirements absent a substantial showing, such as the one made in *Ake*, of a significant benefit to the truth-seeking function of a trial."

Moore, 809 F.2d at 712 n. 8.

IV

The defendant argues that the trial court erred by failing to suppress his "incriminating statements made to mental health workers during the course of court-ordered therapy," and that the use of "evidence derived therefrom, violated due process and his Fifth and Fourteenth Amendment rights against compulsory self-incrimination." As we previously mentioned, the defendant voluntarily enrolled in the Henrico County Mental Health and Retardation Services treatment program before he was convicted of the "peeping tom" offenses. The general district court, which convicted him of these offenses, suspended imposition of the sentences conditioned upon his continued participation in this program. The defendant says that his "admissions to his mental health worker were coerced by the necessity of his complying with the terms of his suspended sentences. The alternative to incriminating himself was the imposition of a twenty-four (24) month jail sentence." We disagree with the defendant.

The Fifth Amendment of the federal Constitution states, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself." This prohibition "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274 (1973).

The Fifth Amendment, however, only prohibits the use of a witness' statements which are the product of compulsion:

> "The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."

Minnesota v. Murphy, 465 U.S. 420, 427, 104 S.Ct. 1136, 1142, 79 L.Ed.2d 409 (1984) (quoting *United States v. Monia*, 317 U.S. 424, 427, 63 S.Ct. 409, 410-11, 87 L.Ed. 376 (1943)). The Supreme Court has stated that

> "in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself. . . . Witnesses who failed to claim the privilege were once said to have 'waived' it, but we have recently abandoned this 'vague term,' . . . and 'made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver.' "

465 U.S. at 427-28, 104 S.Ct. at 1142.

In *Murphy*, the Supreme Court considered whether the Fifth and Fourteenth Amendments prohibit the introduction in evidence of incriminating statements that a parolee made during a meeting with his probation officer. In 1974, Marshall Murphy was questioned by police concerning the rape and murder of a teenage girl. In 1980, Murphy pleaded guilty to an unrelated criminal charge. His punishment was fixed at 16 months' imprisonment, which was suspended, and three years' probation. As conditions of probation, Murphy was required to participate in a treatment program for sexual offenders, to report to his probation officer as directed, and to be truthful with the probation officer "in all matters." Murphy was informed that if he failed to comply with these conditions, his suspension could be revoked. *Id.* at 422, 104 S.Ct. at 1139.

Murphy met with his probation officer regularly until July 1981, when the probation officer learned that Murphy had ceased

participation in the sexual offenders' treatment program. The probation officer informed Murphy by letter that his failure to meet with her would result in an immediate request for a warrant. Subsequently, a counselor in the sexual offender treatment program informed Murphy's probation officer that, during the course of treatment, Murphy had admitted that he had committed a rape and murder in 1974. The probation officer met with her supervisor, and the probation officer decided that she would convey this information to the police. The probation officer sent a letter to Murphy and asked him to contact her to discuss a treatment plan for the rest of his probationary period. Even though the probation officer did not contact the police before she met with Murphy, she had decided before the meeting that she would report any incriminating statements he made to her to the police. *Id.* at 423, 104 S.Ct. at 1140.

Subsequently, Murphy met with the probation officer in her office. The probation officer told Murphy that she had learned that he had admitted to having committed a rape and murder in 1974 and that this information indicated to her that he needed additional treatment. Murphy admitted to the probation officer that he had committed the rape and murder. The probation officer informed Murphy that she intended to relay the information to the police, and she encouraged him to turn himself in, which he refused to do. Subsequently, Murphy was arrested and convicted of first-degree murder. *Id.* at 423-25, 104 S.Ct. at 1140-41.

Rejecting Murphy's contention that his confession was the product of compulsion and, thus, inadmissible, the Supreme Court stated:

> "The threat of punishment for reliance on the privilege [against self- incrimination] distinguishes cases of this sort from the ordinary case in which a witness is merely required to appear and give testimony. A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not rise to a self-executing privilege. The result may be different if the

> questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution. Even so we must inquire whether Murphy's probation conditions merely required him to appear and give testimony about matters relevant to his probationary status or whether they went further and required him to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent. Because we conclude that Minnesota did not attempt to take the extra, impermissible step, we hold that Murphy's Fifth Amendment privilege was not self-executing."

Id. at 435-36, 104 S.Ct. at 1146-47 (footnote omitted).

Applying the aforementioned principles here, we hold that Husske's statements were not the product of compulsion and, thus, his Fifth Amendment right against self-incrimination was not violated. First, we note that the defendant's obligation to participate in the mental health treatment program did not in itself convert his "otherwise voluntary statements into compelled ones." *Id.* at 427, 104 S.Ct. at 1142. We also observe that the defendant, just as in *Murphy*, was not in custody for purposes of receiving *Miranda* protection when he made his incriminating statements. *Id.* at 430, 104 S.Ct. at 1143-44.

Here, just as in *Murphy*, no one required Husske "to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent." *Id.* at 436, 104 S.Ct. at 1147. The record before us is devoid of any evidence that the employees of Henrico County Mental Health and Retardation Services coerced the defendant in any manner. There is no evidence of record that anyone forced the defendant to talk or

threatened him in any way. To the contrary, the defendant, at the urging of his wife, volunteered to Dr. Elwood the statement that the defendant had "completed a rape." After the defendant made his confessions, he executed a release authorizing Henrico County Mental Health and Retardation Services to transmit this information to the Community Diversion Incentive Program.

V

For the foregoing reasons, we will affirm the judgment of the Court of Appeals.

Affirmed.

POFF, Senior Justice, concurs in part and dissents in part.

POFF, Senior Justice, concurring in part and dissenting in part.

The majority affirms the judgment of the Court of Appeals sitting *en banc*, *Husske v. Commonwealth*, 21 Va.App. 91, 462 S.E.2d 120 (1995). Under the mandate of that judgment, the earlier judgment and mandate of a panel of that Court, *Husske v. Commonwealth*, 19 Va.App. 30, 448 S.E.2d 331 (1994), were "withdrawn" and "vacated", and the judgment of the trial court was "affirmed", 21 Va.App. at 92, 462 S.E.2d at 120.

On the Fifth Amendment self-incrimination issue, I concur with the decision of the majority to apply the rule in *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984). I dissent from the majority's decision upholding the denial of Husske's request for expert assistance concerning the controversy over the reliability of forensic DNA evidence that prevailed at the time of this trial. I do not, however, advocate a *per se* rule applicable in every prosecution of an indigent defendant.[1]

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[1] Compare the facts and circumstances underlying the conclusions reached in the precedents of this Court in *Stewart v. Commonwealth*, 245 Va. 222, 239, 427 S.E.2d 394, 405, *cert. denied*, 510 U.S. 848, 114 S.Ct. 143, 126 L.Ed.2d 105 (1993); *George v. Commonwealth*, 242

In *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme Court, invoking the principles applied in *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) and in *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971), held that the due process and equal protection clauses of the Fourteenth Amendment require a State to provide "the basic tools of an adequate defense . . . to those defendants who cannot afford to pay for them." 470 U.S. at 77, 105 S.Ct. at 1093. The panel of the Court of Appeals held that the rule in *Ake* is not limited to capital murder prosecutions or to cases involving an insanity defense. I agree. The majority of this Court does not disagree.

The *Ake* rule applies, however, only when the defendant makes a "threshold showing" that the assistance of an expert to confront the prosecution will be "a significant factor at trial". 470 U.S. at 83, 105 S.Ct. at 1096. In satisfying that requirement, the defendant's burden is twofold. The accused must demonstrate that the expert is required to address a critical issue and that the expert's assistance will contribute to the formulation and perfection of a viable defense. In response to such a showing, "the State must, at a minimum, assure the defendant access to [an expert] who will . . . assist in evaluation, preparation, and presentation of the defense." *Id.*

The majority of this Court holds that the Commonwealth had no such duty here because, they conclude, Husske failed to "show

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Va. 264, 271, 411 S.E.2d 12, 16 (1991), *cert. denied*, 503 U.S. 973, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992); *O'Dell v. Commonwealth*, 234 Va. 672, 686, 364 S.E.2d 491, 499, *cert. denied*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988); *Townes v. Commonwealth*, 234 Va. 307, 332, 362 S.E.2d 650, 664 (1987), *cert. denied*, 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988); *Pope v. Commonwealth*, 234 Va. 114, 119, 360 S.E.2d 352, 356 (1987), *cert. denied*, 485 U.S. 1015, 108 S.Ct. 1489, 99 L.Ed.2d 716 (1988). *See also Moore v. Kemp*, 809 F.2d 702, 712 n. 8 (11th Cir.), *cert. denied*, 481 U.S. 1054, 107 S.Ct. 2192, 95 L.Ed.2d 847 (1987).

a particularized need and that he [would] be prejudiced by the lack of expert assistance." My reading of the record compels the opposite conclusion.

Husske made five "threshold" motions for expert assistance. Their cumulative effect was sufficient to show the trial judge that expert knowledge was to become "a significant factor at trial."

In the first motion, counsel advised the court that "[t]he Commonwealth intends to introduce . . . the evidence of DNA analysis" which he characterized as "crucial to the Commonwealth's case." In support of the second motion, he filed the affidavit of an adjunct counsel, a practicing attorney reputed to be the most knowledgeable member of the local bar in the area of forensic DNA application. The affiant opined that "it is impossible for a lay person to successfully challenge the DNA testing and results without the aid of an expert." He explained that he was "concerned about the problems in testing degraded, low molecular weight forensic samples" and by "over 100 possible problem areas in the use of restrictive enzymes that could lead to an erroneous inclusion."

In preparation for the third request for assistance, counsel filed a motion for discovery of the Commonwealth's DNA evidence which resulted in disclosure of "all the protocols, copies of the autorads, as well as a 47-page Certificate of Analysis." In support of the fourth and fifth motions for assistance, counsel pursued the arguments he had advanced earlier.

Renewing the motion at the conclusion of the Commonwealth's evidence, he proffered some 400 pages of court opinions and testimony "taken in various other cases" that dramatized the nature and dimensions of the DNA dispute prevalent at that time in the scientific community[2]. A sampling of the expert testimony adduced in those cases reveals that, in the two years preceding

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[2] Although the items proffered were excluded from evidence, they were admitted as exhibits for the record.

Husske's trial, many learned scientists had concluded that portions of the DNA testing procedure were "badly flawed," "unreliable" and "demonstrably wrong." And, at least one expert characterized the scientific debates as "significant and honestly-held disagreement" over the validity of testing techniques.

Clearly, the Commonwealth's forensic DNA evidence was a critical issue because it was "a significant factor" in the identification of Husske as the criminal agent. Hence, the prevailing scientific controversy created a "particularized need" to challenge the laboratory methodology employed in the DNA analysis, the validity of the conclusions reached by the analysts, and the testimony of the Commonwealth's expert witnesses. Knowledgeable as they were in the law, Husske's attorneys were laymen in the science of forensic chemistry, and as an indigent accused, Husske was prejudiced by his inability to obtain the expert assistance necessary to satisfy that need.

Consequently, under the facts of this case, the denial of the defense motions for expert assistance was a denial of Husske's rights under the Fourteenth Amendment to due process and equal protection of the laws.

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 7th *day of* December, 1995.

Derek Rocco Barnabei, Appellant,

against Record No. 952169
Circuit Court No. 941302F08B

Commonwealth of Virginia Appellee.

From the Circuit Court of the City of Norfolk

Pursuant to Code § 17-116.06 it is ordered that Record No. 2036-95-1 be certified from the Court of Appeals of Virginia for review by the Supreme Court, and that the case be consolidated with Record No. 952168.

This order constitutes certification pursuant to Rule 5:23 that an appeal has been awarded.

A Copy,

Teste:

/s/[illegible]

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 1st *day of* November, 1996.

Derek Rocco Barnabei, Appellant,

against Record No. 952169
Circuit Court No. 941302F08B

Commonwealth of Virginia Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgments rendered herein on the 13th day of September, 1996 and grant a rehearing thereof, the prayer of the said petition is denied.

On further consideration whereof, the appellant's request for oral argument is denied.

A Copy,

Teste:

/s/[illegible]

Clerk

APPENDIX D

RELEVANT CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

RELEVANT STATUTORY PROVISIONS

Va. Code Ann. § 18.2-31. Capitol murder defined; punishment. — The following offenses shall constitute capital murder, punishable as a Class 1 felony:

* * * *

4. The willful, deliberate and premeditated killing of any person in the commission of robbery or attempted robbery;

5. The willful, deliberate and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration;

* * * *

7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction;

* * * *

Va. Code Ann. § 19.2-264.2. Conditions for imposition of death sentence. — In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it

involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Va. Code Ann. § 19.2-264.3. Procedure for trial by jury. — A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment as provided in § 19.2-295.1.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.

Va. Code Ann. § 19.2-264.4. Sentence proceeding. — A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances

surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense or (vi) mental retardation of the defendant.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed ..... foreman"
or
(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.
Signed ..... foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

Va. Code Ann. § 19.2-264.5. Post-sentence reports. — When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299 except that, notwithstanding any other provision of law, such reports shall in all cases contain a Victim Impact Statement. Such statement shall contain the same information and be prepared in the same manner as Victim Impact Statements prepared pursuant to § 19.2-299.1. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.

Va. Code Ann. § 53.1-151. Eligibility for parole.

* * * *

B1. Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole. In the event of a determination by the Department of Corrections that an individual is not eligible for parole under this subsection, the Parole Board may in its

discretion, review that determination, and make a determination for parole eligibility pursuant to regulations promulgated by it for that purpose. Any determination of the Parole Board of parole eligibility thereby shall supersede any prior determination of parole ineligibility by the Department of Corrections under this subsection.

* * * *

D. A person who has been sentenced to two or more life sentences, except a person to whom the provisions of subsection B1, B2, or E of this section are applicable, shall be eligible for parole after serving twenty years of imprisonment, except that if either such sentence, or both, was or were for a Class 1 felony violation, and he is not otherwise ineligible for parole pursuant to subsection B1, B2, or E of this section, he shall be eligible for parole only after serving thirty years.

* * * *

G. The eligibility time for parole as specified in subsections A, C and D of this section may be modified as provided in §§ 53.1-191, 53.1-197 and 53.1-198.

* * * *

Va. Code Ann. § 53.1-199. Eligibility for good conduct allowance; application.

* * * *

Any person who, on or after July 1, 1993, has been sentenced upon a conviction of murder in the first degree, rape in violation of § 18.2-61, forcible sodomy, animate or inanimate object sexual penetration or aggravated sexual battery and any person who has been sentenced to a term of life imprisonment or two or more life sentences shall be classified within the system established by § 53.1-201. Such person shall be eligible for no more than ten days good conduct credit for each thirty days served, regardless of the class to which he is assigned. One-half of such credit shall be applied to reduce the period of time he shall serve before being

eligible for parole. Additional good conduct credits may be approved by the Board for such persons in accordance with § 53.1-191.

MOTION FILED
APR 10 1997

No. 96-1378 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DEREK ROCCO BARNABEI,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The National Legal Aid and Defender Association, and the New York State Association of Criminal Defense Lawyers, pursuant to Rule 37.2 of the Rules of this Court, hereby move for leave to file this *amici curiae* brief in support of Petitioner, Derek Rocco Barnabei. Barnabei, has indicated his consent to the filing of this Brief. * Respondent has withheld its consent in accordance with what its counsel states is its "usual practice" of not consenting to the filing of *amicus curiae* briefs that oppose the Commonwealth's position.

Both *amici* are organizations of criminal defense lawyers who routinely represent indigent defendants in criminal cases, including capital cases. Thus the members have first-hand experience with the inconsistent and widely divergent criteria courts have established to determine when an indigent defendant may obtain a non-psychiatric expert at state expense.

The National Legal Aid and Defender Association (NLADA), in existence since 1911, is a private non-profit membership organization located in Washington, D.C. Its purpose is to promote the availability of quality legal services in civil and criminal cases to all persons who are unable to afford to retain private counsel. Its membership includes hundreds of public defender and assigned counsel offices providing legal services to poor people accused of criminal offenses, as well as many assigned counsel and other private practitioners. The NLADA is committed to protecting the fundamental rights of poor persons accused of crimes, particularly the rights to the effective assistance of

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* Correspondence reflecting the consent of this party has been filed with the Clerk of the Court.

counsel and a fair trial. The NLADA has published *Standards for Defender Services* (NLADA 1976) and *Performance Guidelines for Criminal Defense Representation* (NLADA 1995). Both require the availability and appropriate use of defense experts for the provision of effective, quality representation. *Standards for Defender Services Standard IV, §§ (2)(d), (3)* (NLADA 1976); *Performance Guidelines for Criminal Defense Representation, Guideline 7.5* (NLADA 1995). The rights to the effective assistance of counsel and a fair trial are in jeopardy when, as here, criminal defendants are denied the aid of a defense expert on an issue critical to the state's proof of its case.

The New York State Association of Criminal Defense Lawyers (NYSACDL) is the largest criminal bar organization in New York. The Association is dedicated to advancing fairness and justice in criminal trials. While it frequently files *amicus curiae* briefs in support of important issues in federal and state courts, NYSACDL rarely files such briefs before review is granted. However, New York courts are regularly confronted with applications for defense experts, and NYSACDL members have thus acquired both significant expertise and interest in this area of law. In addition, the recent advent of the death penalty in New York has created a tremendous need for clarity on the right of capital defendants to expert assistance.

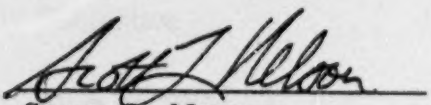
Amici have prepared the following brief to call to this Court's attention the inherent flaws in the stringent standard articulated by the Virginia Supreme Court — as well as other state courts — for appointment of a state-funded expert to assist an indigent defendant. In the experience of *amici*, this standard is neither workable nor appropriate.

Courts applying such standards erroneously view forensic testimony of the type presented by the state at Barnabei's trial as somehow "objective" and "neutral." In

fact, as the multiple scientific studies cited by *amici* persuasively demonstrate, the forensic medical testimony provided in Barnabei's case was highly subjective and misleading, in addition to being presented by a witness inherently allied with the state. Without an expert of his own to testify at trial or to assist in the preparation of cross-examination or trial strategy, Barnabei — like many other indigent defendants — was placed at a palpable disadvantage, in violation of his constitutional rights to a fair trial and equal protection. Such a violation is inimical to *amici's* support of the right to present a defense and the integrity of the adversarial system.

For the foregoing reasons, the motion by *amici* for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,



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Buckley v. Fitzsimmons, 509 U.S. 259 (1993) 9

Eddings v. Oklahoma, 455 U.S. 104 (1982) 10

Gideon v. Wainwright, 372 U.S. 335 (1963) 2-3

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Johnson v. Mississippi, 476 So.2d 1195 (Miss. 1985) 14

Johnson v. State, 731 P.2d 993 (Okla. Ct. Crim. App. 1987) 14

Moore v. Zant, 722 F.2d 640 (11th Cir. 1 . . . 13, 14, 15

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MISCELLANEOUS AUTHORITIES:

Alleged Rape: An Invitational Symposium, 12 J. Reprod. Med. 133 (1974) 5

American College of Legal Medicine, *Legal Medicine* 576 (3d ed. 1995) 4

S.B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835 (1994) 7

B. Cutler et al., *Expert Testimony and Jury Decision Making: Empirical Analysis*, 7 Behav. Sci. & L. 215 (1989) 11-12

W.G. Eckert et al., *The Pathology and Medicolegal Aspects of Sexual Activity*, 12 Am. J. Forensic Med. Pathology 3 (1991) 5

W.F. Enos & J.C. Beyer, *Management of the Rape Victim*, 18 Annals of Fam. Prac. 97 (1978) 7

M.W. Goodwyn, *Psychiatrist is Ending his Career as a 'Gypsy'; He's Spent 27 Years in Forensic Unit*, Richmond Times Dispatch, Dec. 30, 1995 8

I. Gordon et al., *Forensic Medicine, A Guide To Principles* 360 (3d ed. 1988 5

M. Hansen, *Body of Evidence: When Coroners and Medical Examiners Fail to Distinguish Accidents from Murders from Suicides, a Botched Autopsy can be the Death of a Fair Trial, an Insurance Settlement or a Civil Suit*, 81-JUN A.B.A. J. 60 (1995) 8

A.A. Lauber & M.L. Souma, *Use of Toluidine Blue for Documentation of Traumatic Intercourse*, 60 Obstetrics and Gynecology 644 (1982) 5

M.K. Norvell et al., *Investigation of Microtrauma After Sexual Intercourse*, 29 J. Reprod. Med. 269 (1984) 5

P. Rosenthal, *Nature of Jury Response to the Expert Witness*, 28 J. Forensic Sci. 528 (1983) 11

F.T. Schornhorst, *Don't Be Cowed By Scientific Evidence: A Pretrial Primer for Prosecutors and Defense Attorneys*, 3-SPG Crim. Just. 18 (1988) 8

W. Schwarzer, *Ethics and the Expert Witness*, 2 Shepard's Expert and Scientific Evidence 587 (1995) 15

R. Serrano, *FBI Issued Flawed Bombing Analysis, U.S. Probe Finds; Law Enforcement: Lab's 'Unsound' Conclusions Favor Prosecutors in Oklahoma City Trial, Draft Report States. Case Isn't Expected to be Compromised, Agency Chief Says*, L.A. Times, March 22, 1997 8-9

29 Wright & Gold, *Federal Practice and Procedure; Evidence* 11

INTEREST OF THE *AMICI CURIAE*

The interests of the *amici curiae* are detailed in the accompanying Motion. Briefly, both *amici* are organizations of criminal defense lawyers who routinely represent indigent defendants in criminal cases, including capital cases. *Amici* have a direct and substantial interest in ensuring that the rights to effective assistance of counsel and a fair trial are upheld. These rights are imperiled under the stringent standard imposed by the Virginia courts and other courts for the appointment of a defense expert at state expense, where an expert can assist the defense on an issue critical to the state's proof of its case.

INTRODUCTION

In a capital case, a criminal defendant's access to the assistance of an expert may be fundamental to fashioning and presenting a defense. When the defendant cannot afford an expert, the unrebutted testimony of a state expert may determine the outcome of the trial. In Derek Barnabei's case, the state's expert provided testimony at trial that made the difference between a long prison sentence and a death sentence. Barnabei was convicted of murder with the aggravating offense of rape. The defendant had had consensual sexual intercourse — including anal intercourse — with the murder victim in the weeks before she died. The *only* evidence of nonconsensual intercourse to support the rape conviction — and Barnabei's eligibility for the death penalty — was the medical examiner's testimony that the victim's bruises and an anal tear evidenced force.

Although Barnabei's counsel had the opportunity to cross-examine the medical examiner, he did not benefit from the aid of an expert to prepare that cross-examination, nor did he have the chance to present expert testimony to rebut

the medical examiner. Under the Virginia Supreme Court's standard, Barnabei, in order to receive expert assistance, would have had to make a "particularized showing" that an appointed expert would reach a conclusion that was beneficial to him. This threshold -- especially in the case of an indigent criminal defendant facing the death penalty — is too high and, in the vast majority of cases, insurmountable. As the Petition for Certiorari makes clear, the state and federal courts have developed divergent standards for determining a defendant's entitlement to expert assistance. The *amici* submit this Brief not to repeat the Petitioner's analysis of the conflicting caselaw, but to amplify the reasons why the standard selected by the Virginia courts, and other courts that have erected similar barriers to the appointment of experts, ignores the nature and effects of state-sponsored expert testimony, and deprives the defendant of a fair opportunity to counter the state's expert. A writ of certiorari is needed to clarify standards with due recognition for the realities of expert testimony in criminal prosecutions.

REASONS FOR GRANTING THE WRIT

I.

EXPERT MEDICAL TESTIMONY REQUIRES ADVERSARY TESTING

A. Expert Medical Testimony Is Often Inherently Subjective

The adversary system lies at the very heart of the just administration of the criminal laws. While there is no disputing that an indigent person charged with a crime is constitutionally entitled to oppose the state's lawyers with a lawyer of his own, *Gideon v. Wainwright*, 372 U.S. 335

(1963), that same accused's constitutional right to oppose the state's non-psychiatric expert with an expert of his own needs to be elucidated by this Court. As explained in the Petition for Certiorari, federal and state courts have considered the appointment of defense experts to rebut the state's experts under a babel of standards. Many of these are far more restrictive than the standard adopted by this Court for a psychiatric expert in *Ake v. Oklahoma,* 470 U.S. 68 (1985). In a case in which the forensic testimony presented by the expert was as subjective and indeterminate as the psychiatric testimony in *Ake*, the Virginia Supreme Court adopted one of the most onerous standards — requiring a defendant to make a "particularized showing" that he would actually benefit from "favorable testimony" should an expert be appointed. That court's application of the standard in this case — as well as in the companion case of *Husske v. Commonwealth,* Pet. App. 21a, 476 S.E.2d 920 (Va. 1996), confirms that virtually no matter what showing Barnabei's defense counsel made (short of demonstrating what testimony an appointed expert would give), the appointment of an expert would have been refused. Whatever rule this Court may adopt, Virginia's excessive and unworkable standard deprived Barnabei of a fair trial. It is akin to saying that an indigent criminal defendant gets a lawyer if he can make a particularized showing to the court that he is innocent.

In the trial court, Barnabei sought the assistance of a forensic expert to rebut the testimony of the Commonwealth's medical examiner, whose testimony provided the sole evidence to support Barnabei's rape conviction, and, ultimately, his eligibility for a death sentence. Despite Barnabei's request for an independent forensic pathology expert "to analyze the autopsy photographs and the medical examiner's report, evaluate the examiner's testimony at trial, and, if appropriate, offer

contrary testimony," the trial judge found no need to appoint an expert for the defendant, because he saw no basis for challenging the word of "the man who performed the autopsy." Pet. 4. The Virginia Supreme Court agreed, finding that Barnabei failed to make a particularized showing that he would adduce "favorable testimony" from his expert. Pet. App. 10a.

Both decisions rest on a flawed understanding of the role of forensic experts at criminal trials. The presumption of objectivity and accuracy that the courts below afforded the medical examiner's testimony was unfounded in the context of the testimony he provided regarding the alleged rape.

According to the state's own evidence, Barnabei had consensual intercourse with the victim in the weeks before she was murdered. The evidence supporting the rape conviction consisted exclusively of the medical examiner's testimony — based on photographs he took at the autopsy — that he observed evidence of vaginal bruising and an anal tear. The medical expert offered the opinion that these injuries indicated there was "violent penetration" and that it was "inconsistent with normal consensual intercourse." Pet. App. 8a. This testimony was the only evidence presented by the state to support the jury's ultimate conclusion that Barnabei had raped the victim before murdering her.

Far from being "objective" or "scientific" fact, the medical examiner's testimony at trial was inherently subjective and rested on highly debatable inferences. The overwhelming and longstanding consensus of medical experts is that forensic testimony regarding the physical trauma resulting from an act of intercourse does not establish that the intercourse was non-consensual. *E.g.*, American College of Legal Medicine, *Legal Medicine* 576-77 (3d ed. 1995) ("[T]he presence of wounds does not necessarily mean

that valid consent to coitus was not given. [Various activities] produce minor injuries and may produce severe injuries, even though valid consent to sexual intercourse has been given."); I. Gordon et al., *Forensic Medicine, A Guide To Principles* 360 (3d ed. 1988) ("It should be recognized that the presence of injuries is not necessarily indicative of rape. . . . Injuries may also be inflicted during intercourse which has taken place with the consent of the female."); M.K. Norvell et al., *Investigation of Microtrauma After Sexual Intercourse,* 29 J. Reprod. Med. 269, 270 (1984) (finding that when a magnification technique was used to detect the presence of genital trauma, there was evidence of "microtrauma" in 61.1% of women who engaged in *consensual* intercourse).[1] Specific types of consensual sexual activity, including anal intercourse, are also more likely to result in severe injury. W.G. Eckert et al., *The Pathology and Medicolegal Aspects of Sexual Activity,* 12 Am. J. Forensic Med. Pathology 3, 14 (1991).

Other experts have rejected altogether the notion that a medical expert is even capable of rendering a medical opinion as to whether rape has occurred based on an examination of a victim's physical injuries. *Alleged Rape: An Invitational Symposium,* 12 J. Reprod. Med. 133, 134 (1974) ("There is no way to tell by a medical examination whether rape has occurred. . . . Determining whether actual, forcible rape took place is a legal question — not a medical one.").

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[1] One study of physical trauma occurring during intercourse found that "unequivocal lacerations" appeared in a patient after consensual intercourse. A.A. Lauber & M.L. Souma, *Use of Toluidine Blue for Documentation of Traumatic Intercourse,* 60 Obstetrics and Gynecology 644, 647 (1982). Thus, "consent for coitus does not preclude trauma, just as absence of trauma does not provide proof of consent." *Id.*

The Virginia courts in this case erred when they simply assumed there would be no basis on which to challenge the medical examiner's testimony. The literature demonstrates that the medical examiner's conclusion that the physical evidence indicated that the intercourse was non-consensual was not an objective medical opinion based upon his expertise as a pathologist. Rather, it was a highly debatable interpretation of the physical condition of the victim's body, and one that another expert would be very likely to challenge.

In *Ake v. Oklahoma,* 470 U.S. 68 (1985), the Court wrote that because "[p]sychiatry is not . . . an exact science . . . juries remain the primary factfinders on this issue." 470 U.S. at 81. The *Ake* Court went on to hold that, by presenting information regarding the defendant's mental condition in a meaningful form, "the psychiatrists *for each party* enable the jury to make its most accurate determination of the truth on the issue before them." *Id.* (emphasis added). Neither is forensic analysis an "exact science," and by refusing to appoint a defense expert, the trial court in this case precluded the jury from making "its most accurate determination" as to whether or not a rape occurred.

B. When Presented By A Medical Examiner Or Other State Forensic Expert, Expert Testimony Is Essentially Being Presented By A Member Of The Prosecution Team

Both the trial court and the Virginia Supreme Court viewed the testimony of the state medical examiner as entitled to a presumption of neutrality, placing the burden on the Petitioner to offer a particularized showing that his proposed expert would present favorable testimony conflicting with the examiner. Not only does such a

requirement undermine the presumption of innocence, it also ignores the close collaboration that occurs between the prosecution and the state medical examiner. In fact, the state medical examiner is properly viewed as an arm of the state. Indeed, Virginia state medical examiners typically work hand in hand with the police from the outset of an investigation of an alleged rape and forward all evidence to the district crime laboratory, where it is readily available to the prosecution. W.F. Enos & J.C. Beyer, *Management of the Rape Victim*, 18 Annals of Fam. Prac. 97, 102 (1978).

When state medical examiners testify at trial regarding their physical examination of the victim, they drape the mantle of science over the state's case. As one commentator points out (emphasis added):

> The specialists in the offices of both the district attorneys and the attorneys general have . . . a group of full-time experts at the crime laboratory and in the medical examiner's offices to respond to crime scenes and provide expert testimony when needed. If mental health issues are raised, the prosecution has a group of mental health professionals at the state mental facilities. *No one seriously contends that these professional witnesses are objective.* They routinely testify for the prosecution as part of their work, and prosecutors enjoy longstanding relationships with them.

S.B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer,* 103 Yale L.J. 1835, 1845 (1994). A Virginia forensic psychiatrist, summing up a lengthy career assisting the prosecution, candidly described the relationship between prosecutors and

state forensic experts when he told a reporter that he "credits the forensic unit's psychological and clinical staffs with a stellar record of credibility in aiding prosecutions." M.W. Goodwyn, *Psychiatrist is Ending his Career as a 'Gypsy'; He's Spent 27 Years in Forensic Unit,* Richmond Times Dispatch, Dec. 30, 1995, at B-1.

Not only are medical examiners closely allied with prosecutors in their respective jurisdictions, their fallibility has been widely acknowledged. A survey of the work of coroners, medical examiners and forensic pathologists recognized the many mistakes that have been made in forensic examinations, "paint[ing] a disturbing picture of a process that is, at best, woefully inadequate and, at worst, often inept." M. Hansen, *Body of Evidence: When Coroners and Medical Examiners Fail to Distinguish Accidents from Murders from Suicides, a Botched Autopsy can be the Death of a Fair Trial, an Insurance Settlement or a Civil Suit,* 81-JUN A.B.A. J. 60, 62 (1995).

More generally, a systematic effort to scrutinize the proficiency of government crime labs yielded "dismal results." F.T. Schornhorst, *Don't Be Cowed By Scientific Evidence: A Pretrial Primer for Prosecutors and Defense Attorneys,* 3-SPG Crim. Just. 18, 46 (1988). Even the most vaunted crime lab in the country — the crime lab of the Federal Bureau of Investigation — has been subject to scrutiny and harsh criticism for its work in some of the most important investigations in the nation. A Justice Department report prepared in draft form by the agency's Inspector General found that the crime lab made "scientifically unsound" conclusions in the Oklahoma City bombing case. R. Serrano, *FBI Issued Flawed Bombing Analysis, U.S. Probe Finds; Law Enforcement: Lab's 'Unsound' Conclusions Favor Prosecutors in Oklahoma City Trial, Draft Report States. Case Isn't Expected to be*

Compromised, Agency Chief Says, L.A. Times, March 22, 1997, part A, at 1 . In particular, a supervisory agent came in for the harshest criticism from the Inspector General, who found his analyses to be "scientifically unsound . . . and . . biased in favor of the prosecution." *Id.*

This Court is no stranger to the results to which the prosecution's preferential access to forensic experts can lead. For example, *Buckley v. Fitzsimmons,* 509 U.S. 259 (1993), where the Court held that county prosecutors in Illinois should not receive absolute immunity for fabricating false evidence, was a murder case in which the prosecutors had sought to match boots supplied by the defendant with a bootprint on the door of the victim's home. After studies conducted by forensic experts in Illinois and Kansas failed to produce a reliable connection between the boot and the footprint, the prosecutors turned to a North Carolina anthropologist who was "well known for her willingness to fabricate unreliable expert testimony." Not surprisingly, she was able to make a "positive identification" that the bootprint matched the defendant's boot. *Id.* at 262.

Taken together, the confederation of government forensic experts, police and prosecutors, and the fallibility of the forensic testimony that results, negate the easy assumption that a defendant will generally derive no real benefit from countering the state's expert. Requiring the defendant to make a "particularized showing" that he will be able to provide favorable testimony of his own in rebuttal to the state's expert ignores the reality that such testimony is often biased and unreliable. We do not mean to suggest that state forensic testimony is never provided in subjective good faith, but rather that the institutional realities of the close affiliation between state experts and law enforcement prevent such experts from offering neutral or objective testimony.

C. Unrebutted Medical Testimony Presented By The State Has A Powerful Effect On The Jury

The dangers of one-sided expert testimony in a criminal case — especially a capital case — are further demonstrated by the effect this lopsided testimony can have on the jury.[2] In this case, for example, without the opportunity to rebut the testimony of the state's expert by presenting independent expert testimony, all the jury heard at trial regarding the use of force during intercourse was the testimony of the state medical examiner, diminished only — if at all — by the defense lawyer's cross-examination.

In Barnabei's case, cross-examination was an extremely poor substitute for a defense expert, because of the extent to which the expert couched his interpretations and inferences in the language of science. In addition to hearing a detailed description of the victim's wounds, the jury heard the medical examiner say that "[a] violent penetration" of that area had occurred, and that it was "[v]ery unlikely" the bruise occurred during "normal" consensual intercourse. Trial Testimony of Dr. F. Presswalla at 673. Thus, the expert provided not only the "pure science" within his medical expertise, but also what was in essence a legal conclusion as to the cause of the wounds. Because the expert presented himself as an individual with special qualifications, his testimony was "surrounded by an 'aura of

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[2] Although an indigent criminal defendant's right to the assistance of an expert has been framed under the rubric of due process and equal protection as opposed to his eighth amendment right to be free from "cruel and unusual punishment," U.S. Const. Amend. 8, this is a capital case. When the state imposes the death penalty, there is a heightened need for reliability in the evidence leading to the imposition of capital punishment. *See Eddings v. Oklahoma,* 455 U.S. 104, 110 (1982). This is all the more reason why the presentation of forensic medical testimony in a capital case must be subjected to adversarial testing.

infallibility'" that made it very difficult for the jury to distinguish those opinions that fell within his expertise from those that did not. 29 Wright & Gold, *Federal Practice and Procedure; Evidence* § 6262, at 182-83 & n.19.

Jurors are particularly susceptible to being swayed by such testimony, regardless of its technical merit, because of the credibility and authority they attach to the expert witness himself. Rather than critically assessing the substance of an expert's testimony, jurors often focus on details peripheral to the subject of the testimony, such as whether the expert comes across as impressive, articulate and appealing. One study interviewed jurors after a trial involving extensive expert testimony regarding "voiceprinting." P. Rosenthal, *Nature of Jury Response to the Expert Witness*, 28 J. Forensic Sci. 528 (1983). Confronted with complex or confusing testimony that they did not understand, the jurors shifted their attention to observable characteristics of the expert, or to other ancillary elements of the situation, and were guided in their response by their perception of how the expert came across. In the study, the jurors were most impressed with one witness who was extremely articulate and presentable. The jury's reaction to him — based not on what he said but how he said it and what he was wearing — was that he was a "real scientist." *Id.* at 529-30. Given such juror responses, there is an obvious danger that where only one side has a "real scientist," it will receive an unfair and potentially decisive advantage.

When a defendant has an expert of his own, it makes a difference. One study showed that jurors are far more sensitized to and skeptical toward the prosecution's expert testimony when the defense presents an expert who can expose the problems and unreliability inherent in such testimony. The defense expert thus provides a "useful safeguard against false convictions." B. Cutler et al., *Expert*

Testimony and Jury Decision Making: Empirical Analysis, 7 Behav. Sci. & L. 215, 223 (1989). In this case, for Barnabei to participate on a remotely even footing with the state, he would have had to put forward expert testimony of his own.

II.

COURTS WIDELY MISPERCEIVE THE NATURE OF FORENSIC TESTIMONY

The misperceptions as to the nature of forensic testimony offered by prosecution experts upon which the Virginia courts based their decision in this case are widespread. For example, in *Schultz v. State*, 497 N.E.2d 531, 532 (Ind. 1986), the defendant was convicted of murder on the strength, *inter alia*, of testimony by forensic experts for the prosecution regarding footprints found at the crime scene and the analysis of blood on a towel found at the defendant's residence. The Supreme Court of Indiana upheld the trial court's denial of the defendant's motion for appointment of experts, holding that:

> The testimony of [the state's] experts involved precise, physical measurements and chemical testing, and there is no showing that these experts were less than precise or able in their testing and observations.

Id. at 534. For the reasons discussed above, however, this model of forensic analysis as akin to mathematical calculation is erroneous. For example, in the context of a rape charge, the fact that trauma can and does routinely occur during consensual intercourse means that a forensic expert opining, on the basis of such trauma, that intercourse

was non-consensual is necessarily offering not a "precise, physical measurement," but a judgment based on speculation.

Nevertheless, other courts have also adopted the model of the state forensic expert as a mere reporter of objective scientific fact. In *Hicks v. State*, 256 Ga. 715, 717, 352 S.E.2d 762, 769 (Ga.), *cert. denied*, 482 U.S. 931 (1987), another murder prosecution, the defendant sought appointment of an expert to analyze blood samples found in his car and on his clothes, in order to counter testimony by state experts that the samples were "consistent" with the victim's blood. Apparently sharing the *Schultz* court's view that forensic analysis is merely an exercise in "precise, physical measurements and chemical testing," the Supreme Court of Georgia approved the trial court's refusal to appoint such an expert because, in part, the trial court offered the defendant an opportunity to have the state crime lab perform "any desired additional tests." *Id.* Again, the court's analysis ignored the defendant's need for the opportunity to invoke the judgment and analysis of an independent expert, and forced him to rely solely on members of the prosecution team.

The *Schultz* court went on to suggest that the defendant might have qualified for the appointment of an expert if he had shown "that the truth or accuracy of [the state's experts'] testimony is questionable." 497 N.E.2d at 534. Other courts, again apparently viewing forensic analysis as a matter of precise measurement, rather than judgment, have followed a similar course, denying the appointment of an expert where the defendant fails to show the state's experts to be "incompetent." In *Moore v. Zant*, 722 F.2d 640 (11th Cir. 1983), a defendant convicted of murder sought habeas relief. "Much of the evidence" against him at trial consisted of testimony by state experts regarding their analysis of physical evidence. *Id.* at 648.

The court found no error in the trial court's refusal to appoint a defense expert, because the defendant did not show that those witnesses were incompetent. *Id.* at 649; *see also Johnson v. State,* 731 P.2d 993, 1007 (Okla. Ct. Crim. App.), *cert. denied,* 484 U.S. 878 (1987); *Bostic v. State,* 173 Ga. App. 494, 496, 326 S.E.2d 849, 851 (Ga. App. 1985). In *Yohey v. Collins,* 985 F.2d 222, 227 (5th Cir. 1993), the Fifth Circuit demanded, as a prerequisite to appointment of a defense expert, that the defendant show that a state expert's findings are "inaccurate or . . . subject to disagreement between experts." Of course, to the extent judgment enters into forensic analysis, opinions will always be subject to disagreement.

Some of these same decisions premise the appointment of a defense expert upon some affirmative showing of "bias" on the part of a state expert. *Moore,* 722 F.2d at 649; *Bostic,* 173 Ga. App. at 496, 326 S.E.2d at 851. These decisions ignore the close collaboration between prosecutors and state forensic experts, as well as the fact that such experts often view their role as "aiding" prosecutors.

Finally, courts have also looked to defendants' opportunity to cross-examine prosecution experts in denying the appointment of a defense expert. *E.g., Bostic, supra; Johnson, supra; Johnson v. Mississippi,* 476 So.2d 1195, 1203 (Miss. 1985). In *Moore, supra,* the court held that defense experts were unnecessary where prosecution experts were, on cross-examination, "forthright in admitting the limitations of their opinions." 722 F.2d at 649. For example, the *Moore* court relied on the state's expert in hair analysis admission that it "is impossible to determine in forensic science" whether two hair samples come from the same person. *Id.*

However, a defense expert clearly could have offered more than testimony to this effect. Although the prosecution's expert in *Moore* admitted that it is impossible to determine with certainty whether two hair samples perceived to be "microscopically identical" in fact came from the same individual, he testified that "I'm right every time" about whether two samples are in fact "microscopically identical." A defense expert could have offered testimony regarding the extent to which the question of microscopic identity is one of judgment, as well as his own judgment as to the "identity" of the samples at issue in *Moore*. Such an expert would also have provided crucial assistance to defense counsel in preparing the cross-examination of the state's expert. *See Ake v. Oklahoma,* 470 U.S. 68, 80 (1985) (noting that defense psychiatrist is necessary because, in part, "[t]hey know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers").

Moreover, cross-examination and the presentation of expert testimony by the defense are not interchangeable arrows in the defense lawyer's quiver. This is due not only to the impact an expert can have on the jury, as described above, but also to the difficulties inherent in cross-examining an expert. Recognizing that "the testimony of expert witnesses is pivotal — it decides the case," Judge Schwarzer has succinctly identified the limitations of cross-examination. W. Schwarzer, *Ethics and the Expert Witness,* 2 Shepard's Expert and Scientific Evidence 587, 588 (1995). He explains (*id.* at 591):

> First, expert cross-examination is probably the most difficult task a lawyer faces, and few are able to do it well;

> Second, lawyers will not always have the information necessary to cross-examine effectively. This is particularly true in criminal cases where the defendant may not have the resources to prepare thoroughly and also where science is involved;
>
> * * * *
>
> Finally, there is the adrenaline factor. . . . [U]nder the assault of the cross-examiner, the adrenaline tends to flow and it is natural for the expert to want to defend what she has said and done, even if it may lead to overstatement.

Ultimately, the unwillingness of many courts to afford indigent defendants an opportunity to counter forensic expert testimony offered by the state springs from a fundamentally erroneous conception of the nature of such testimony. The notion that a defendant may only be permitted to match the government's access to expert assistance when he can demonstrate that the government's experts are "incompetent" or have made an identifiable "error," or that an expert retained on his behalf would provide specific favorable testimony, rests on a presumption that, absent such proof by the defendant, the government's experts will simply be providing objectively verifiable and scientifically sound facts, the precise bounds of which can be adequately tested simply through cross-examination.

The problem, however, is not necessarily that the government's experts are incompetent or "wrong" about specific factual matters — it is that they are the *government's* experts, and that their partisan role inevitably colors the inherently subjective and debatable inferences to which they

testify. Thus, imposing on a defendant the impossible burden of demonstrating in advance specific deficiencies in the government's expert proof — without the expert assistance that would allow him to do so in the first place — is particularly unwarranted. The result of such a requirement is that, without the ability to respond in kind, the defendant is unable either to explain to the jury the limitations of the government's expert proof or to present to the jury the alternative interpretations of the evidence that a defense expert could provide. The standard applied by the Virginia courts in this case and by other courts that have erected similar barriers to the appointment of defense experts thus frustrates the promise of equal justice held out by this Court's decision in *Ake*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

DEREK ROCCO BARNABEI,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. SHOULD THIS COURT GRANT CERTIORARI TO REVIEW PETITIONER'S CLAIM THAT HE HAD A DUE PROCESS RIGHT TO A FORENSIC EXPERT, WHEN HE CONCEDED ON DIRECT APPEAL THAT THE SUPREME COURT OF VIRGINIA HAD APPLIED THE CORRECT LEGAL STANDARD TO THIS CLAIM?

II. SHOULD THIS COURT GRANT CERTIORARI TO REVIEW PETITIONER'S INSUBSTANTIAL CLAIM THAT *SIMMONS V. SOUTH CAROLINA*, 114 S.CT. 2187 (1994), SHOULD BE EXTENDED TO PAROLE ELIGIBLE DEFENDANTS?

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OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at 252 Va. 161, 477 S.E.2d 270 (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are recited in the petition at 2 and the appendix to the petition at 42a-47a.

STATEMENT OF THE CASE

Barnabei was indicted in the Circuit Court of the City of Norfolk, Virginia for the rape and capital murder of Sarah Wisnosky on September 21-22, 1993. After an eleven day guilt phase trial, a jury convicted Barnabei of capital murder and rape on June 12, 1995. On June 13, 1995, the trial court conducted the sentencing proceeding on Barnabei's rape conviction, and the jury sentenced him to thirteen years on that offense. The sentencing phase of the capital murder trial then commenced, and on June 15, 1995, the jury sentenced Barnabei to death, based on both the statutory "future dangerousness" and "vileness" predicates. *See* Va. Code § 19.2-264.4. On September 15, 1995, the trial court imposed the death sentence on Barnabei.

Barnabei appealed to the Supreme Court of Virginia, which on September 13, 1996, affirmed Barnabei's convictions and death sentence. On November 1, 1996, the State Supreme Court denied Barnabei's petition for rehearing.

STATEMENT OF FACTS

Guilt Phase

Shortly before the start of fall classes in September, 1993, at Old Dominion University in Norfolk, Virginia, Barnabei contacted an advisor to the fraternities and sororities at Old Dominion University, and falsely informed her that he was a member of the Tau Kappa Epsilon (TKE) fraternity from New Jersey and "wanted to help out the group." (App. 2119-2122).[1] In the ensuing days, Barnabei began to associate with members and "pledges" of the TKE fraternity at ODU. Thereafter, Barnabei leased a room in a house in Norfolk, which was located near the ODU campus. All of his four roommates were past or present ODU students and either were TKE members or friends of such members. (App. 2486-2487, 2577, 2830-2831).

As Barnabei continued to ingratiate himself with members of the TKE fraternity, he became heavily involved in its "rush" activities in which it sought prospective new members. (App. 2150-2154, 2203-2205).

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[1] The facts relevant to the capital murder are recited in the opinion of the Supreme Court of Virginia on direct appeal. *Barnabei v. Commonwealth*, 252 Va. at 165-169, 477 S.E.2d at 272-275. References to the trial record will be made to the joint appendix on direct appeal and cited as "App. ___."

Among other things, Barnabei participated in "dorm storming," that is, he went to dormitories on the ODU campus and asked people to attend various TKE activities so that they would become interested in joining the fraternity. (App. 2152-2154, 2547-2548). During one such "dorm storming" effort, Barnabei encountered first semester students Sarah Wisnosky and Nicki Vanbelkum. (App. 1284-1285). Sarah was seventeen years old, was 5'5" inches tall, and weighed 95 pounds. (App. 1716).

On at least one occasion in September, Barnabei persuaded Sarah to go to his house, and she did not return to her dorm room until the following day. (App. 1297). At a "toga party" at the TKE fraternity on the following weekend, Barnabei "shunned [Sarah] the whole evening." (App. 2510, 2557). A TKE member and a "pledge" spoke that night with Sarah, who had become intoxicated, about her relationship with Barnabei. Sarah said: "He is alright, but I have had better." (App. 2258). Later that morning, Sarah slept in Barnabei's bed, but she later returned to her dorm room without incident. (App. 1335-1336). On neither of the two occasions in which Sarah came back to her dorm room on the following day did she tell Vanbelkum that she had had sexual relations with Barnabei. (App. 1342). On the day after the toga party, Barnabei "was bragging about his sex life" when the TKE member who had spoken with Sarah repeated what she had said to him in the hours after the toga party. (App. 2482). Barnabei then denied having had sexual intercourse with Wisnosky, stating that they had had oral sex. (App. 2220).

On the evening of September 21, 1993, Barnabei and Sarah, along with several others, watched a movie on

television at his house. (App. 2332-2334, 2420-2421). Barnabei then went to attend a pledges' meeting at a nearby house, while Sarah remained behind and watched the rest of the movie with several others. (App. 2592-2594). Barnabei ultimately returned home with Rolland Gee, a TKE pledge, at about 12:30 or 1:00 a.m. (App. 2438). Gee and Barnabei went to the latter's bedroom; there, Sarah was wearing a robe and smoking a cigarette. (App. 2439-2441). After the three listened to the radio for about 30 minutes, Gee left and returned home at about 2:00 a.m. That night, Barnabei played a compact disc much louder than usual, and two roommates pounded on his locked door for about five minutes to get him to turn it down. (App. 2529, 2855). Later, Barnabei rushed into the bedroom of his roommate Troy Manglicmont and demanded that he move his Jeep out of the driveway next to the house, because it was blocking the access of Barnabei's car to the street. (App. 2596-2597, 2601-2602). After Manglicmont moved his vehicle out of the way, Barnabei backed his own automobile out of the driveway so fast that he hit the side of the adjoining house. (App. 2603-2604).

During the course of the morning and afternoon of September 22, Barnabei borrowed, or tried to borrow, money from several acquaintances. (App. 2478-2479, 2784). Barnabei claimed that he was going out of town briefly "on business" and that he would repay the loans in the next several days. (App. 2299-2364, 2479).

Shortly after 6:00 p.m. on September 22, Wisnosky's body was found floating on the Lafayette River in Norfolk, about one mile from Barnabei's house. (App. 1258-1259). The medical examiner, Dr. Faruk Presswalla,

testified that his autopsy revealed that prior to her death Sarah had suffered at least ten blunt force injuries to the back and right side of her head. (App. 1720, 1767, 1800). Dr. Presswalla opined that a ballpeen hammer "or something else that is similar to that" had caused the injuries. (App. 1785).[2]

In addition, Presswalla found bruising of the introitus in the vagina as well as a laceration in the bottom part of the anal opening. (App. 1720-1721). The anal tear was about one-half inch long. (App. 1723). Presswalla stated that a woman would not normally incur such a tear and that a "forcible stretching of the anal opening" would have accounted for it. (App. 1724, 1729). While Presswalla concluded that Sarah had not been a virgin, he testified that the vaginal bruising which he had observed was not likely explained by this fact. "People don't get their vaginas bruised in normal sexual intercourse." (App. 1804-1805). Presswalla also opined that various possible innocent explanations for his findings (for example, constipation or horseback riding) were unlikely and that the anal tear was inflicted "very close to the time of her death. . . . ") (App. 1825-1833). Further, the vaginal bruising was ante-mortem. (App. 1729). Also, Presswalla

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[2] The Commonwealth introduced evidence that in the month before Sarah's murder, Barnabei had rented a room from Tina Smith in her Virginia Beach apartment. Barnabei had left Smith's home, without giving her any notice. Later, she determined that among the items which were missing from her home was a ballpeen hammer. (App. 2817-2819). Additionally, one of Barnabei's roommates at the Norfolk house testified that the two had used a ballpeen hammer in Barnabei's bedroom to put his waterbed together. (App. 2863-2864).

concluded it was unlikely someone had had sex with the victim after she had died. (App. 1734).

Additionally, Presswalla found petechiae on Sarah's face, which was "a manifestation of mechanical asphyxia." (App. 1737). Such things as the bruises on Wisnosky's neck and larynx suggested to Presswalla that she had been "manually strangled." (App. 1789). The injuries to her larynx also occurred before death. (App. 1791-1792).

Dr. Presswalla testified that the "primary cause [of death] was the head injuries due to the multiple blows. A contributory factor was the mechanical asphyxia." (App. 1788). Dr. Presswalla concluded, based on the degree of rigor mortis he had found in Sarah's arms and legs, that she would have had to have been put in the Lafayette River at about the time of her death. (App. 1751-1754). Dr. Presswalla determined that the most likely time of death was on the night of September 21-22, 1993. (App. 1762-1765).

The prosecution also put on evidence that, instead of returning to Norfolk as he had promised, Barnabei in the ensuing days rented a room in an apartment in Akron, Ohio. On December 19, 1993, local police ran a check on Barnabei's license plate and learned that there were outstanding warrants for the murder of Wisnosky. (App. 3000). Later that same morning, the police went to the apartment of Carla DeSantis and arrested Barnabei, who was staying with her. (App. 3006-3008).

Penalty Phase

The Commonwealth presented two witnesses in the sentencing phase. Sandra Joaquin testified about her "on and off" romantic relationship with Barnabei, which had begun when they were college students in 1989 and which had ended in August, 1990. (App. 3505-3507). Joaquin recounted various acts of violence which Barnabei had committed against her and others. (App. 3508-3527). On several occasions, Barnabei threatened to kill her. (App. 3527-3529).

Paula Barto, Barnabei's ex-wife, testified concerning their marriage. Again, Barnabei frequently committed violent acts against her and threatened to kill her. (App. 3550-3554). On one occasion, Bartos successfully resisted Barnabei's attempts to have anal intercourse with her, but on other occasions she finally was forced to submit to intercourse. (App. 3555-3559). When Paula finally separated from Barnabei in June, 1988, he left "many messages" on her answering machine in which he threatened various acts of violence. (App. 3563).

Barnabei presented mitigating evidence from various family members and friends. The jury then sentenced Barnabei to death, "finding after consideration of his prior history that there is a probability that he will commit criminal acts of violence that will constitute a continuing serious threat to society and/or that his conduct in committing the offense is outrageously or wantonly, vile, horrible, or inhuman that it involved torture, depravity of mind, or aggravated battery to the victim. . . . " (App. 3696)

ARGUMENT

I. PETITIONER'S CLAIM THAT THE SUPREME COURT OF VIRGINIA ERRED IN UPHOLDING THE TRIAL COURT'S DENIAL OF HIS MOTION FOR AN EXPERT FORENSIC PATHOLOGIST CONTRADICTS MUCH OF HIS OWN ARGUMENT ON DIRECT APPEAL AND OTHERWISE FAILS TO PRESENT A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION.

Barnabei, who was convicted of capital murder in the commission of, or subsequent to, rape, contends that the trial court erred in denying his motion for the appointment of a forensic pathologist concerning the cause of Wisnosky's bruises and injuries. Barnabei says that certiorari review is necessary in order to clarify the standard governing an indigent criminal defendant's request for expert assistance. The record establishes, however, that Barnabei's present claim is substantially inconsistent with his argument on direct appeal and otherwise does not raise a significant federal constitutional issue.

On direct appeal, the Supreme Court of Virginia, applying the standard it had adopted in another opinion issued on the same day, *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (1996), *cert. denied*, 117 S.Ct. 1092 (1997), held that Barnabei failed to establish " 'that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial.' " 252 Va. at 170-171, 477 S.E.2d at 275-276. Far from challenging the Virginia Supreme Court's application of the *Husske* test to this case, in his petition for rehearing Barnabei instead stated that the state court had "formally

embraced the federal right previously established in *Ake v. Oklahoma*, 471 U.S. 68 (1985). . . . Barnabei argued, both in his brief and in oral argument that the [Virginia Supreme] Court adopt the very holding it did in *Husske*. He did so because it is the law and because the application of the *Husske* rule to Barnabei's facts require a reversal because *these requirements were met in Barnabei's trial*. . . . " (Pet. Reh. at 5, emphasis in original). Yet, Barnabei now says that "the rigid standard employed by the court below is especially inappropriate where, as here, a defendant faces the death penalty." (Pet. at 19).

Thus, on direct appeal Barnabei did not merely default on the present argument, but he raised a claim largely antithetical to it. *See generally Springfield v. Kibbe*, 480 U.S. 257 (1987); *Webb v. Webb*, 451 U.S. 493 (1981); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). *See also United States v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1604 n.5 (1994); U.S.S.Ct. Rule 14.1(h) (petitioner must establish that federal question "was timely and properly raised so as to give this Court jurisdiction to review the judgment").[3]

Moreover, Barnabei made clear on direct appeal that application of the concededly valid *Husske* rule necessitated a case-specific, fact-specific analysis. In his petition for rehearing, Barnabei asserted that the Virginia

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[3] It is noteworthy that the petitioner in the *Husske* case similarly argued in his certiorari petition that this Court should grant certiorari to resolve the claimed conflict in the lower courts regarding an indigent defendant's due process right to expert assistance. This Court's denial of certiorari in *Husske*, 117 S.Ct. 1092 (1997), hardly suggests that Barnabei's argument is anymore "cert-worthy." *See generally Maggio v. Williams*, 464 U.S. 46 (1983).

Supreme Court's ruling in *Husske* reflected its acknowledgment that an indigent defendant is constitutionally entitled to the " 'basic tools necessary to an adequate defense.' What those tools might be varies from case to case. . . . " (Pet. Reh. at 5). Indeed, in his petition for rehearing, Barnabei's complaint was that the Supreme Court of Virginia had misapplied the *Husske* test to the facts of this case. It is axiomatic that certiorari does not lie to review such a fact-specific claim as Barnabei's, the adjudication of which can affect only the particular case under review. *See Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.); *United States v. Johnston*, 268 U.S. 220, 227 (1925); U.S.S.Ct. Rule 10 ("certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

Finally, the record in this case demonstrates that Barnabei was not constitutionally entitled to the appointment of an expert forensic pathologist concerning the nature of the victim's injuries, nor was he prejudiced by the denial of his motion. Prior to trial, Barnabei moved to exclude the prospective testimony of Dr. Presswalla, the chief medical examiner who had conducted the autopsy of Wisnosky, concerning whether force had been used to inflict any of the injuries to her vagina or anus. (App. 88). Barnabei based his motion *in limine*, in part, "upon the subjective nature of Dr. Presswalla's opinion [and] the multitude of other explanations for the injuries which are consistent with consensual sex. . . . " (App. 88).

At a subsequent hearing on Barnabei's motion *in limine*, defense counsel asserted that the medical examiner's testimony would not be founded upon a reasonable

degree of medical certainty, because he could not pinpoint the possible causes of the anal and vaginal injuries. (App. 406-408). During the same hearing, defense counsel stated that he had interviewed Presswalla who indicated various possible causes for the decedent's injuries. (App. 375, 407-408). Far from arguing that only a defense expert could effectively rebut Presswalla's testimony at trial, defense counsel instead contended that Presswalla's testimony should be excluded as overly speculative. (App. 408). Thereafter, Presswalla testified concerning his findings that Wisnosky had suffered injuries to her vagina and anus and elaborated on his conclusion that "forcible" penetration accounted for the injuries. (App. 409-414).

Throughout his direct testimony at trial, Presswalla merely described the vaginal and anal injuries which he had observed during the autopsy. (App. 1720-1723, 1726-1729). Presswalla never remotely opined as to whether any sexual intercourse had been consensual; rather, he merely described the "violence" or "forcible penetration" which had caused the contusions and tears that he described. (App. 1727-1729). It was defense counsel, on cross-examination, who repeatedly questioned Presswalla concerning the possible reasons for the injuries. (App. 1825-1833). Presswalla expressly made clear that his use of the term "forcible" had merely been a medical reference to "the actual force that has to be applied to have the insertion take place." (App. 1827). Beyond this, the defense thoroughly cross-examined Dr. Presswalla at trial about his findings, getting him to concede, for example, that any of several non-criminal actions might have accounted for the injuries. (App. 1825-1833).

Significantly, in moving to strike the prosecution's evidence on the rape charge, Barnabei relied upon Dr. Presswalla's own testimony that he used the word "force" as a medical, not legal, term. (App. 3215). Thereafter, during closing arguments the prosecutor, contrary to Barnabei's present assertion, did not rely "entirely on testimony of the medical examiner." (Pet. at 4). Instead, throughout his closing argument the prosecutor, consistent with Virginia law, also emphasized the brutality of Wisnosky's murder as probative of the fact that Barnabei had also raped her. (App. 3296, 3411). *See also Tuggle v. Commonwealth*, 228 Va. 493, 512, 323 S.E.2d 539, 550 (1984), *vacated on other grounds*, 471 U.S. 1096 (1985); *Keil v. Commonwealth*, 222 Va. 99, 101-105, 278 S.E.2d 826, 827-830 (1981). In response, defense counsel quoted directly from Presswalla's trial testimony that "generic rough sex" could have accounted for the force to the victim's vaginal and anal areas which he had observed. (App. 3329-3330, 3391).

Thus, the record in this case readily reflects that the appointment of an expert forensic pathologist for the defense was unnecessary to vindicate Barnabei's right to a fair trial. As a result of Dr. Presswalla's pre-trial discussions with defense counsel and his testimony at the pretrial hearing, Barnabei was well-equipped to cross-examine him at trial. Further, unlike, for example, the expert in *Harrison v. State*, 635 So.2d 894 (Miss. 1994), Presswalla never testified that Barnabei "raped" Wisnosky. On the contrary, his conclusions were significantly more limited. To the extent that Barnabei's own cross-examination of Presswalla resulted in any elaboration upon the examiner's opinions as to the possible causes of the victim's

genital injuries, Barnabei can hardly rely upon this as a basis for asserting that he was constitutionally entitled to a forensic expert. In sum, much like the defendant in *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985), Barnabei's "undeveloped assertions that the requested assistance would [have been] beneficial" at trial hardly suffices to establish any due process violation.

II. BARNABEI'S PAROLE ELIGIBILITY CLAIM DOES NOT RAISE A SUBSTANTIAL FEDERAL CONSTITUTIONAL ISSUE.

Weeks says that this Court should grant certiorari in order to resolve two allegedly unanswered questions in *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994). In *Simmons*, a plurality of the Court held "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." 114 S.Ct. at 2190. Supposedly, this Court should grant certiorari in this case in order to determine whether *Simmons* should be extended to parole eligible defendants, like Barnabei, and whether the Eighth Amendment also bestows a similar right on a defendant to present evidence and argument concerning his parole status. For several reasons, Barnabei's claim does not present a substantial federal constitutional question and thus is not a proper vehicle for this Court's review.

On direct appeal, Barnabei advanced a much more narrow, case-specific argument than in the present petition. There, Barnabei asked the Supreme Court of Virginia

"to decide a critical issue which is a fairly narrow one. . . . Barnabei's case involves unique facts which make the general rule [in Virginia limiting *Simmons* to parole ineligible defendants] inapplicable: 1) defense counsel requested the jury be provided with accurate parole information; 2) the Commonwealth urged that the defendant posed a future danger to society at large; and 3) the jury specifically asked about the defendant's parole eligibility." (Def. Br. at 48). By Barnabei's own assessment, then, this case involves "unique" facts and, virtually by definition, this Court's disposition of his claim would provide little guidance to other courts. Moreover, the case-specific, fact-specific claim which Barnabei advanced on direct appeal is just the kind which this Court has made clear it will not review. *See Texas v. Mead*; *United States v. Johnston*, 268 U.S. at 227.

Moreover, Barnabei is hardly the first Virginia death row prisoner to assert that *Simmons* should be extended to afford both a due process and a Eighth Amendment right to present evidence and argument concerning the parole status of a parole eligible defendant. Significantly, however, this Court has consistently declined to review substantially similar arguments raised by other Virginia death row petitioners. *See, e.g., Weeks v. Virginia*, 116 S.Ct. 100 (1995); *Williams v. Virginia*, 115 S.Ct. 2616 (1995); *Quesinberry v. Murray*, 115 S.Ct. 2585 (1995); *Cardwell v. Virginia*, 115 S.Ct. 1826 (1995); *Wright v. Virginia*, 115 S.Ct. 1800 (1995); *Swann v. Virginia*, 115 S.Ct. 234 (1994). This Court's repeated denials of similar *Simmons* arguments in these cases provide "ample evidence" that Barnabei's argument does not warrant the granting of certiorari. *See Maggio v. Williams*, 464 U.S. at 51-52.

Finally, even if this Court were considering the present *Simmons* claim for the first time, Barnabei's contention that *Simmons* should be extended to parole eligible defendants is groundless. Accordingly, Barnabei necessarily cannot demonstrate any special or important reasons for the granting of certiorari. *See* U.S.S.Ct. Rule 10.1 (writ "will be granted only when there are special and important reasons therefor").

In *Simmons*, both the plurality and concurring opinions made abundantly clear that, except in those cases whose future dangerousness is in issue and the defendant is not parole eligible, a State otherwise retains the right to prohibit parole eligibility information. *See* 114 S.Ct. at 2196 (plurality) ("In a State in which parole is available, how the jury's knowledge of parole availability will affect the [sentencing] decision . . . is speculative, and we shall not lightly second-guess a decision whether to inform a jury . . . regarding parole. States reasonably may conclude that truthful information regarding the availability of commutation, pardon, and the like, should be kept from the jury"); *id.* at 2200 (O'Connor, J., concurring) ("In a State in which parole is available, the Constitution does not require . . . jury consideration of that fact.").[4] Accordingly, because Barnabei concededly would have been eligible for parole after 25 years, his claim, irrespective of its constitutional trappings, raises nothing more than a non-

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[4] Insofar as Justice O'Connor's concurring opinion may be deemed narrower than the plurality opinion of Justice Blackmun, her position (joined by the Chief Justice and Justice Kennedy) must be regarded as controlling. *See Romano v. Oklahoma*, 114 S.Ct. 2004, 2010 (1994) (controlling effect given to concurring opinion that provides requisite fifth vote).

reviewable issue of state law. *See generally Michigan v. Long*, 463 U.S. 1032, 1038 (1983).

Finally, petitioner's Eighth Amendment argument provides even less reason for this Court to grant review in this case. First, the plurality in *Simmons* explicitly disavowed any reliance upon the Eighth Amendment as a basis for its holding. 114 S.Ct. at 2193 n.4. Not surprisingly, Weeks has not cited one post-*Simmons* case holding that the Eighth Amendment affords a capital murder defendant the right to inform the jury of his parole eligibility status.

CONCLUSION

For the foregoing reasons, Barnabei's claims raise little more than fact-specific arguments of the kind which this Court routinely declines to review. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 96-1378

IN THE
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October Term, 1996

DEREK ROCCO BARNABEI,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Virginia College of Criminal Defense Attorneys (VCCDA) respectfully moves pursuant to Rule 37.2 for leave to file the attached brief *amicus curiae* in this case. The Petitioner has consented to the filing of a Brief A*micus Curiae* of the Virginia College of Criminal Defense Attorneys. The Commonwealth of Virginia was contacted, but, pursuant to their standard policy, will not consent.

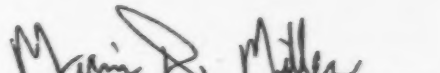
STATEMENT OF INTEREST

The Virginia College of Criminal Defense Attorneys (VCCDA) is a private, nonprofit, statewide organization of Virginia lawyers whose practice is primarily dedicated to the defense of those accused of crime. The organization consists of are private attorneys and public defenders who represent indigent defendants. Our primary purpose is to improve the criminal justice system in the Commonwealth of Virginia by improving the quality of representation provided to criminal defendants.

The VCCDA has been permitted to participate as amicus in litigation in our State on the issue of indigent defense. State appellate courts have also allowed us to participate as amicus curiae in other cases which concern questions of cardinal importance to the fair administration of justice in the criminal law system.

Our interest in this case stems not only from our abiding interest over the distressing lack of funds and resources for the poor who cannot afford to hire a lawyer to defend them in criminal cases in Virginia and elsewhere in the United States, but also from our longstanding concern that it is a violation of due process for someone to be unable to defend themselves simply because they are poor. Our membership regularly represents indigent defendants, which puts us in a unique position for perspective on the issue regarding experts for indigent defendants presented in this case.

Virginia College of Criminal Defense Attorneys, by:



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INTEREST OF AMICUS CURIAE

The Virginia College of Criminal Defense Attorneys (VCCDA) is a statewide organization of Virginia lawyers whose practice is primarily dedicated to the defense of those accused of crime. We are a private, nonprofit membership organization

headquartered in Richmond, Virginia. Our primary purpose is to improve the criminal justice system in the Commonwealth of Virginia by improving the quality of representation provided to criminal defendants. We hold accredited biannual Continuing Legal Education seminars focused on enhancing the skills of the criminal defense practitioner.

Our organization consists of members from both large and small private law firms as well as various public defender offices across the Commonwealth. We have a major interest in the lack of resources for the indigent accused in our State. At present, Virginia is at the bottom of the ladder. We are fiftieth (50th) out of all fifty (50) states in the amount of funding made available for general representation of the indigent.

This case presents an important question regarding fundamental fairness for the indigent accused, not just in Virginia but in the entire Country. The linchpin of this death penalty case was the prosecutor's uncontested expert witness who said that in his subjective opinion there had been forced sexual activity. (5 Tr. 1720-24; 1726-29; 1804-5, 1826-33). Counsel for the indigent accused was not allowed to consult with a defense expert to prepare cross examination or for a contrary opinion on this subject.

On the face of it, this case presents the quintessential Catch-22. A poor person, such as this defendant, cannot have an expert they need to defend their case unless they already have an expert who can tell the court how that expertise will help defend the case. The criminal defense lawyers of Virginia, through the Virginia College of Criminal Defense Attorneys, have a significant interest in this aspect of an accused's right to a full and effective defense. We bring a unique perspective to this case because so many of our numbers represent the indigent.

SUMMARY OF ARGUMENT

This Court should grant a Writ of Certiorari in this case to quell the confusion and disparate decisions on this fundamental issue in the wake of this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* should not be limited merely to psychiatric medicine, but should include other fields of medicine such as forensic pathology which have subjective aspects similar to psychiatry. Psychiatry is not the only area of medicine and science which involves subjective evaluation of observed and learned facts. Furthermore, in various states and federal circuits where the prosecution rests a significant part of their case on the testimony of an expert in a given field, the defense is entitled to consult with their own expert to determine whether an expert can assist in the preparation of effective cross examination on this area of expertise and whether or not it is proper to have a countervailing expert offer their opinion. When dealing with areas of expertise one is dealing, per force, with subjects that are above and beyond the average lay person's, even a lawyer's, knowledge. It takes someone with expertise in a specialized field, such as psychiatry or forensic pathology, to explain how such expertise can be significant to the defense in a criminal case. Indeed, when an area of expertise is key to a case, lawyers without expertise in that area can be ineffective for failure to explore how such expertise can help them defend their client. They should not need to have an expert to establish the need for an expert. This Catch-22 creates an insurmountable burden and should be laid to rest. This case presents an excellent opportunity for the Court to clarify this issue.

ARGUMENT

The Virginia College of Criminal Defense Attorneys is deeply concerned about the inequities and unfairness inherent in the way many jurisdictions, Virginia chief among them, deny

poor people a fair chance to defend themselves. Since this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), it has become quite common for indigents to have psychiatrists appointed in insanity cases and other cases in which the defendant's mental status is a relevant issue. Unfortunately, many courts have turned the obligation of an accused to make a preliminary showing of the need for an expert, as pronounced in *Ake*, into an insurmountable hurdle. In *Husske v. Commonwealth*, 476 S.E.2d 920 (Va. 1990), for example, the central issue in the case focused on DNA testing. At the time, there was a great deal of scientific controversy swirling around the validity of DNA testing. The defense attorney provided the court with a number of affidavits in support of his request for a court appointed DNA expert. The affidavits were from defense attorneys who had been involved in criminal cases in which an expert on DNA was important to the defense because of the centrality of DNA testing to the case. The Supreme Court of Virginia ruled that the affidavits were inadequate. Essentially, *Husske* held that the defense needed an expert to establish the need for the court to appoint an expert. *Husske*, *supra.*

Ake needs clarification in this case just as *Brady v. Maryland*, 273 U.S. 83 (1963), needed further clarification in *United States v. Bagley*, 473 U.S. 667 (1985). *Brady* made it clear that an accused is entitled to have the government disclose exculpatory evidence because to deny such evidence to an accused in a criminal trial constitutes constitutional error and deprives the defendant of a fair trial. *Bagley* made it quite clear that exculpatory evidence includes evidence which impeaches prosecution witnesses. Obviously, if there is evidence which could lead the jury to disbelieve the prosecution's witnesses, then that is as exculpatory as proof that someone else perpetrated the crime. Many courts, after *Brady*, and before *Bagley*, did not include impeachment evidence in their definitions of exculpatory evidence. *Ake* needs the same sort of

clarification now as *Bagley* provided to *Brady*.

Ake recognized that when the mental condition of an accused is relevant to his criminal culpability or to punishment, then the assistance of a psychiatrist may well be crucial to the ability of the accused to martial his defense. This Court recognized that psychiatric medicine played a pivotal role in many cases throughout the Country. Psychiatrists gather information from tests and other sources, analyze it, draw plausible conclusions based on these facts and their medical training and assist the jury in understanding important facts in the case. There is both an objective and a subjective aspect to psychiatric medicine and it is unfair, as *Ake* recognized, for only the prosecutor to have the availability of expertise for presenting their position to the jury. *Ake*, 470 U.S. at 79-84. Regardless of the financial status of a defendant, when issues that involve subjective determinations by experts, such as mental health or forensic pathology, are pivotal in a criminal case, the defense has to be armed with its own expert to insure that the trial is fair.

Forensic pathology is even more prevalent in criminal trials than psychiatric medicine. There is no doubt that it, like psychiatric medicine, often involves a subjective analysis and conclusion drawn from observed and gathered facts. In this case, for example, the state's forensic pathologist, give two essentially subjective opinions which were the linchpin of the prosecution's case. First he said that the physical evidence led him to the opinion that there was the use of force. Next he said that these conditions were not normal and were likely to have occurred during what, in his subjective opinion, was not normal sexual intercourse. (5 Tr. 1720-24; 1726-29; 1804-5, 1826-33). The defense could not attack the subjective conclusion through effective cross examination based on expert analysis or a countervailing expert opinion. Even though it is undisputed that there is no clear-cut, consistent medical viewpoint on the

conclusions to be drawn from the facts present in this particular case, the jury only heard one side.

There is no dispute that there was evidence in this case of prior consensual intercourse between the defendant and the victim and that this sexual activity included anal intercourse. There are some medical experts who may well have testified that the evidence on which the prosecution's expert relied would not support his conclusion. There are expert treatises which an expert for the defense could have explained to defense counsel for use in effective cross examination. In the medical field, for example, there are many terms used in medical texts and treatises which are only understood by persons with medical training, skill and education. A lay person, even a lawyer, may have no understanding as to the meaning and significance of these technical terms. A defense lawyer without the assistance of an expert in such circumstances is at a hopeless disadvantage. More importantly, the indigent client without the money to hire such an expert is severely hampered in the ability to prepare and present the defense side of the case.

As this Court recognized in *Ake*, numerous state statutes guarantee expert services which are necessary for an adequate defense in a manner similar to the Criminal Justice Act, 18 U.S.C. § 3006A. The issue now is how the accused shows entitlement to such assistance in cases that do not involve psychiatry. In North Carolina, an accused is entitled to an expert to help assess and attack a prosecutor's expert on a key issue in a case even if it is not a psychiatrist. *See State v. Bridges*, 385 S.E.2d 337 (N.C. 1989). Similarly, in Mississippi, when, as here, the state uses an expert to present the main evidence on a crucial element of a case, the defense is entitled to their own expert to evaluate, assess and defend against the state's position. *See Harrison v. State*, 635 So. 2d 894 (Miss. 1994). The United States Court of Appeals for the Fourth Circuit has held that an indigent who needs an expert on a

crucial issue in a case is not required to prove what the expert would say in order to obtain the expert. *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980). Virginia, and other states, in contrast, essentially require an indigent defendant to have an expert in order to prove the need for an expert. *See Husske, supra*, and the decision below in *Barnabei v. Commonwealth*, 477 S.E.2d 270 (Va. 1996). This disparity should be resolved.

There is another, equally compelling reason for granting a Writ of Certiorari in this case and clarifying the circumstances in which an indigent is entitled to consult with an expert in areas other than psychiatric medicine. When the area of expertise concerns one of the most central issues to be decided in the case, the accused cannot obtain effective assistance of counsel unless, in cases such as the one now pending before this Court, defense counsel is given access to their own expert. In a case such as this, a defense attorney cannot be effective without expert assistance in understanding, analyzing and evaluating the prosecution's expert testimony.

As this Court noted in *Strickland v. Washington*, 466 U.S. 668 (1984), courts should give deference to strategic choices made by defense counsel but, in order for the defense to enjoy this deference, the choices must be made "after thorough investigation of the law and facts relevant to plausible options . . . [because] counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690-91. Where, as here, counsel for an indigent recognizes the need to investigate a core issue which requires specialized expertise defense counsel does not have, the right of the accused to effective, informed representation is denied unless the courts

make such experts available to indigent defendants. [1]

Particular attention needs to be paid to fairness at the initial trial level these days because of the curtailment of post-conviction review. Recently, the Seventh Circuit in *Hope v. United States*, ___ F.3d ___, 60 Crim. L. Rep. 1494 (7th Cir. 1997), determined that the new habeas corpus provision of the Anti-Terrorism and Effective Death Penalty Act denied a federal prisoner habeas corpus relief focused solely on sentencing issues even if there is new evidence to support the relief. This denial of habeas corpus relief on newly discovered evidence relating to sentencing not only applies to federal prisoners under 28 U.S.C. §2255, but, according the Seventh Circuit, also to state prisoners under 28 U.S.C. § 2254. *Id.* Thus, if through some largess, defendants, such as the one in the instant case, were given free expert assistance after trial and it shattered the legitimacy of the prosecutor's expert's testimony on sentencing issues, that would be of no avail. The expert is needed at trial.

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[1] The problems attendant on the subjective nature of much scientific testimony in criminal cases has been highlighted by the recent problems uncovered in the FBI Lab. The Inspector General report which is due soon has already been released to some defense attorneys in some cases. It reveals questionable laboratory results and improper shading of evidence to favor the prosecution. In West Virginia, a medical examiner, Dr. Zane's, testimony as a forensic pathologist, was found to have been so unreliable that the State Supreme Court looked to appoint a special prosecutor to investigate whether or not he should be indicted. We are not dealing with neutral, objective unassailable evidence in cases such as this and to allow only one side onto the playing field is unfair.

According to the Fifth Circuit in *Blankenship v. Johnson*, ___ F.3d ___, 60 Crim. L. Rep. 1513 (5th Cir. 1997), the Anti-Terrorism and Effective Death Penalty Act's stringent habeas standards do not entitle a state prisoner to assistance of counsel when the prosecutor seeks a discretionary review of an appellate decision overturning his conviction. In many states, such as Virginia, the accused is not entitled to counsel when proceeding on a Writ of Habeas Corpus. *See Howard v. Warden*, 348 S.E. 2d 211 (Va. 1986). The same denial of counsel at habeas also obtains in Mississippi; however, in Mississippi, as noted above, the trial is more fair because they do not deny the defense the right to their own expert on areas which are quintessential to the trial. They do not require use of an expert to obtain the right to an expert.

There is something inherently unfair in allowing only one side to have an expert testify before the jury on a core issue central to the decision in the case. This is especially true in areas such as forensic pathology that involve subjective viewpoints. It is also unfair to give that one side, the prosecution, the right to object to whether or not the defense is allowed to have their own expert help them meet the prosecutor's expert. To give the prosecutor input in the defense right to prepare the defense case is inherently unjust. We are not talking, in this case, about some tangential issue. We are talking about a subject which was considered central because without the forensic pathologist testimony on the issue of rape, this would not be a death penalty case. His testimony should not have been allowed to go unanswered. The defense cannot be expected to cross examine a medical doctor on a specialized area involving subjective judgments when the defense does not have training in that area of expertise. The defense should not be forced to allow the conclusions of the doctor to go unanswered without even so much as an opportunity to consult an expert to determine whether or not there is a countervailing point of view. This Court has to address these issues.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 96-1378

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DEREK ROCCO BARNABEI,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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REPLY FOR PETITIONER

As the petition demonstrated, this case squarely presents two significant and recurring issues that have divided the state and lower federal courts. In its opposition brief, respondent fails to offer a single valid reason why certiorari should not be granted.

ARGUMENT

A.

As explained in the petition (Pet. 8-14), there is a sharp and growing conflict among the state and lower federal courts over the indisputably important issue of when an indigent criminal defendant, faced with expert testimony for the prosecution, is entitled to the assistance of an independent expert. Furthermore, as the petition also showed (Pet. 7-8, 16), this case presents an excellent vehicle for considering the issue: the question is clearly presented and arises in the most compelling of circumstances, *i.e.*, where eligibility for capital sentencing turned upon the prosecution's expert testimony. Respondent's arguments in opposition to certiorari are meritless.

1. Respondent's brief is noteworthy not for what it says, but for what it does not — and cannot — say. First, respondent does not deny that the state and lower federal courts are hopelessly split over the proper standard to apply when an indigent criminal defendant requests the assistance of a non-psychiatric expert. Second, respondent does not dispute that this question is a significant and recurring one. Third, respondent does not make even a cursory attempt to defend the decision below. As a consequence, nothing in respondent's brief undermines petitioner's showing that review should be granted.

2. The briefs lodged by *amici curiae* underscore the importance of the issue presented here. As the brief of the National Legal Aid and Defender Association stresses, the testimony offered by medical examiners and other prosecution experts is often subjective and unreliable, frequently biased, and sometimes simply "scientifically unsound." Brief of *Amici Curiae*

the National Legal Aid and Defender Association and the New York State Association of Criminal Defense Lawyers at 6-9 (quotation omitted) [hereinafter, "National Defenders Br."].[1] Indeed, as *amicus curiae* the Virginia College of Criminal Defense Attorneys points out, one state supreme court found the testimony of a medical examiner so unreliable that it ordered a special prosecutor to investigate whether to bring charges against the examiner. *See* Brief of *Amicus Curiae* the Virginia College of Defendant Attorneys at 8 n.1 [hereinafter, "Virginia College Br."]. Nevertheless, due to the "aura of infallibility" that experts enjoy, jurors often place an inordinate amount of trust in the testimony of prosecution experts — especially where, as here, there is no defense expert to answer their testimony. *See* National Defenders Br. at 10-12.

The danger of the jury improperly crediting biased and unsound testimony was especially great in this case. As petitioner pointed out (Pet. 5), the prosecution's expert testified that the victim was unlikely to have engaged in normal, consensual sexual activities based upon vaginal bruising and an anal tear. As *amici* point out, however, there is an "overwhelming and longstanding consensus" among medical experts that "forensic testimony regarding the physical trauma resulting from an act of intercourse does not establish that the intercourse was non-consensual." National Defenders Br. at 4 (citations omitted). Thus, as *amici* demonstrate, this case addresses the very heart of the problem often raised by the prosecutor's expert testimony.

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[1] *Amici* rely in part upon a draft report from the Department of Justice Office of the Inspector General on the Federal Bureau of Investigation's laboratories, the most respected forensic laboratory in the country. *See* National Defenders Br. at 8-9. The final report, issued April 15, 1997, found "significant instances of testimonial errors, substandard analytical work, and deficient practices," including scientifically flawed testimony in a number of major cases. United States Department of Justice/Office of Inspector General Special Report, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* 2 (1997).

3. Unable to dispute that the traditional criteria for certiorari are satisfied here, respondent asserts (Opp. 8-10) that petitioner's argument before this Court is inconsistent with the argument advanced before the Virginia Supreme Court. This assertion is frivolous. Before the Virginia Supreme Court, petitioner argued that under *Ake v. Oklahoma*, 470 U.S. 68 (1985), courts have required the appointment of a defense expert "[w]here the State's case involves important expert testimony." App. Br. at 19 (citations omitted).[2] Petitioner also argued that his case was indistinguishable from *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980), which specifically rejected the suggestion that criminal defendants, faced with expert testimony presented by the prosecution, must show that a defense expert would provide favorable testimony in order to obtain independent expert assistance. App. Br. at 19-22. The Virginia Supreme Court therefore understood petitioner to be arguing there, as here, that he was entitled to expert assistance under *Ake* "because the only evidence of rape adduced at trial was the medical examiner's testimony." Pet. App. 9a. As the Virginia Supreme Court both considered and ruled on this claim, Pet. App. 9a-10a, there can be no doubt that petitioner's claim was properly raised below. *See, e.g.*, *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *see also Raley v. Ohio*, 360 U.S. 423, 436-37 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.").

Nonetheless, respondent contends (Opp. 8-9) that petitioner waived this claim by arguing in his petition for rehearing that he should prevail under the standard applied below and in *Husske v. Commonwealth*, 476 S.E.2d 920 (1996), *cert. denied*, 117 S. Ct. 1092 (1997). Plainly, however, petitioner did not seek to apply *Husske* on appeal: indeed, as respondent acknowledges (Opp. 8), *Husske* was not handed down until the day of the decision below. More fundamentally, a party does not waive properly raised

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[2] Relevant excerpts from petitioner's brief before the Virginia Supreme Court, and from his petition for rehearing before that court, have been lodged with the clerk of this Court.

arguments challenging a rule simply by arguing on rehearing that he also prevails under that rule. Respondent offers no rationale for this absurd proposition, and none of the cases that he cites even remotely supports it.[3]

In any event, the arguments made by petitioner below in his petition for rehearing were in no way inconsistent with the arguments advanced here and in his original brief before the Virginia Supreme Court. While petitioner contended that he should have received expert assistance under *Husske*, he continued to rely upon *Ake* and *Williams*. Pet. Reh. at 5-8. Moreover, he specifically criticized *Husske*'s requirement that criminal defendants make a "particularized showing" of the testimony that a defense expert would present as being without basis "under the very federal law which the *Husske Rule* claims to invoke." *Id.* at 7-8 (quotation omitted). In short, contrary to respondent's desperate suggestion, petitioner made the same basic arguments in his petition for rehearing that he now urges this Court to consider.[4]

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[3] In each of the cases cited by respondent, the petitioner failed to raise the claim in question at *any* point in the courts below. *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) ("Respondent, however, did not raise a Fourth Amendment claim in the District Court or the Court of Appeals . . . ."); *Springfield v. Kibbe*, 480 U.S. 257, 258 (1987); *Webb v. Webb*, 451 U.S. 493, 498 (1981) ("We cannot conclude on this record that petitioner raised the federal claim that she now presents to this Court at any point in the state-court proceedings."); *Cardinale*, 394 U.S. at 438 (noting that "the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below"). Thus, none of these cases can be read to support respondent's suggestion that an argument properly raised on direct appeal can be waived by making a narrower (or even different) argument on rehearing.

[4] Because petitioner did not rely upon the standard applied by the court below in either his brief on appeal or his petition for rehearing, respondent's contention that this petition presents a "fact-specific" application of that standard (Opp. 9-10) is specious.

4. Respondent also argues (Opp. 12) that petitioner was not prejudiced by the denial of expert assistance because his counsel "was well-equipped to cross-examine" the medical examiner.[5] This argument is without merit. As respondent observes (Opp. 12), trial counsel was able to force the medical examiner to concede that the bruising he observed on the victim might have been caused by "generic rough sex." 5 Tr. 1832-33. Trial counsel was not, however, able effectively to challenge the medical examiner's testimony that the bruising was caused by a "violent penetration" and was "very unlikely" to have occurred during "normal sexual intercourse." 5 Tr. 1804-05. Moreover, because trial counsel was apparently unaware of the skepticism with which most medical experts view this type of forensic testimony, *see* National Defenders Br. at 4-5, he was unable to demonstrate the fundamentally unscientific and unsound nature of the medical examiner's conclusions. Thus, far from demonstrating that no expert assistance was necessary, trial counsel's vigorous but medically unsophisticated cross-examination underscores that lay cross-examination is a poor substitute for expert assistance.[6]

The Commonwealth also attempts to divert attention from the medical examiner's testimony by asserting (Opp. 11-12) that the medical examiner "never remotely opined as to whether any sexual intercourse had been consensual" and that the prosecutor relied upon the brutality of the victim's murder as proof that the sexual relations were not consensual. This contention is

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[5] Although respondent also points out (Opp. 10-11) that petitioner moved to exclude the testimony of the medical examiner, it does not explain the relevance of this fact. As demonstrated in the petition and the briefs of *amici curiae*, having lost on that motion, petitioner's only hope of receiving a fair trial was to secure the appointment of his own expert.

[6] The prejudice that petitioner suffered as a result of the medical examiner's testimony goes beyond the rape conviction and death sentence: had the jury understood the flaws in the testimony of the prosecution's expert, it may have concluded that petitioner did not commit the rape or the murder of the victim.

disingenuous. Given petitioners' prior history of consensual sex with the victim,[7] evidence that the victim was brutally murdered is hardly proof that petitioner engaged in nonconsensual sexual relations with the victim. Moreover, as petitioner pointed out (Pet. 5), the Commonwealth specifically argued to the jury that, because the medical examiner testified that the victim's bruises "cannot occur without some force," "we know that the sex that the defendant had wasn't voluntary consensual sex." 9 Tr. 3296-97. Thus, having relied heavily at trial on the medical examiner's testimony, the Commonwealth cannot now claim in good faith that the testimony was inconsequential.

5. Respondent's final argument (Opp. 9 n.3) is that certiorari should be denied in this case because this Court denied certiorari in the *Husske* case. This argument is also without merit. First, it is well-settled that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *United States v. Carver*, 260 U.S. 482, 490 (1923). As Justice Brennan has noted, this Court may deny certiorari in one case and then "take the very next case raising the same question." R. Stern & E. Gressman, *Supreme Court Practice* 240 n.56 (7th ed. 1993) (quoting W. Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar Ass'n Q. 393, 402-3 (1960)).[8] Second, there was an obvious reason why certiorari was not granted in

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[7] While the Commonwealth appears at one point (Opp. 3) to suggest that petitioner did not engage in sexual relations with the victim, as the petition demonstrated (Pet. 4 & n.1), the testimony of the Commonwealth's own witnesses overwhelmingly established such relations.

[8] *Maggio v. Williams*, 464 U.S. 46 (1983) (per curiam), does not suggest otherwise. In *Maggio*, the Court considered a stay of execution and, in so doing, looked to prior denials of certiorari because the standard for granting a stay of execution is whether there is "a reasonable probability that four members of the Court would consider the [issues in the case] sufficiently meritorious for the grant of certiorari." 464 U.S. at 48 (quotation omitted). This Court has never extended *Maggio* beyond this narrow context.

Husske: the defendant in that case "confessed to the crimes" for which he was convicted. *Husske*, 476 S.E.2d at 926. Indeed, *Husske* was such an obviously poor vehicle for addressing the right of indigent criminal defendants to expert assistance that the Commonwealth waived its right to respond to the petition in that case. This case, by contrast, presents a perfect vehicle for considering this issue. Review by this Court should be granted.

B.

The second question presented by this case is whether a state may prevent a defendant threatened with the death penalty from informing a capital sentencing jury that he or she will be ineligible for parole for a substantial period of time. As the petition demonstrates (Pet. 20-21), this important and recurring question, which was left open in *Simmons v. South Carolina*, 512 U.S. 154 (1994), has divided the state and lower federal courts.

1. Once again, respondent's brief is most notable for what it omits. Here, too, respondent does not deny that there is a conflict among the lower courts or that the issue left open in *Simmons* is both important and recurring. The Commonwealth also does not dispute that this Court's decision in *O'Dell v. Netherland*, *see* 117 S. Ct. 631 (1996) (No. 96-6867) (granting certiorari), may shed light on the issues raised in this petition and that it would therefore be worthwhile to hold this case pending disposition of *O'Dell*.

2. Instead, respondent asserts (Opp. 13-14) that petitioner advanced a "narrow, case-specific argument" based upon three facts: trial counsel asked to provide the jury with accurate parole information; the Commonwealth asserted that petitioner posed a future danger to society; and the jury asked about petitioner's parole eligibility. In every *Simmons* case, however, the state argues that the defendant presents a future danger and the defendant asks to provide the jury with accurate parole information. Moreover, while petitioner pointed out that the jury asked about his parole eligibility, his argument did not turn upon that fact. *See* App. Br. at 48-54. It should come as no surprise

then that the Virginia Supreme Court did not treat petitioner's argument as narrow and fact-specific. *See* Pet. App. 16a.

3. Respondent's assertion (Opp. 15) that *Simmons* somehow rejected petitioner's due process argument is groundless. The lower courts would not be in conflict over this question if this Court had definitely resolved it. Moreover, contrary to respondent's suggestion (Opp. 15), the plurality and concurring opinions in *Simmons* did not limit their application of the due process right to rebut claims of future dangerousness to instances of parole ineligibility; those opinions simply limited their holdings to the facts before the Court. Indeed, Justice Scalia took the position that the reasoning in *Simmons* could not be limited to defendants permanently ineligible for parole. In his view, the decision was "at least as sweeping as this: that the Due Process Clause overrides state law limiting the admissibility of information concerning parole *whenever* the prosecution argues future dangerousness." 512 U.S. at 183 (Scalia, J., dissenting) (emphasis in original).

4. Respondent's suggestion (Opp. 16) that this Court should not review petitioner's Eighth Amendment argument because the plurality in *Simmons* left the question open is specious. That this Court has left a question unresolved is a reason for *granting* certiorari, not denying it. *See, e.g. Dolan v. City of Tigard*, 512 U.S. 374, 374 (1994), *Georgia v. McCollum*, 505 U.S. 42, 46 (1992).

5. Respondent also argues (Opp. 14) that these questions are not worthy of certiorari because this Court has previously denied other petitions raising the same issue. As demonstrated above, *see supra* p. 6, that argument is without merit.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

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